In The

Supreme Court of the United States

October Term, 1963

No. 751

F. J. COSMARK, JOHN C. MARTIN and MELVIN D. PATTERSON, Individually, and as Representatives of a Class,

Petitioners

v.

STRUTHERS WELLS CORPORATION; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS OF AMERICA (A.F.L.-C.I.O.); LOCAL LODGE 636 Thereof; RUSSELL A. GRAHAM, Individually; LEE A. REISINGER, DONALD E. CHAPEL and HARRY A. WILES, Individually, and as Representatives of a Class,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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In The
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No.

F. J. Cosmark, John C. Martin and Melvin D. Patterson, Individually; and as Representatives of a Class,

Petitioners

v.

Struthers Wells Corporation; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers of America (A.F.L.-C.I.O.); Local Lodge 635 Thereof; Russell A. Graham, Individually; Lee A. Reisinger, Donald E. Chapel and Harry A. Wiles, Individually, and as Representatives of a Class,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

F. J. Cosmark, John C. Martin, and Melvin D. Patterson, individually, and as representatives of a class, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania, entered in this cause on October 17, 1963.

OPINIONS BELOW

The opinion rendered by the Supreme Court of Pennsylvania, on October 17, 1963, affirming the order of the Court of Common Pleas of Crawford County, Pennsylvania, dismissing the complaint, is reported in 412 Pa. 211, 194 A. 2d 325 (1963), and is printed in Appendix B, pages 26 to 35.

JURISDICTION

The final judgment of the Supreme Court of Pennsylvania was entered on October 17, 1963, and the jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

Does a state court have jurisdiction to award compensatory and punitive damages and specific relief in an action brought by members of a labor union against other members of the labor union, the labor union and the employer, in an action based upon the plaintiffs' being wrongfully deprived of their seniority rights in violation of an existing agreement, and in the negotiation of a subsequent agreement, and where the plaintiffs claimed that the labor union had breached its duty to fairly represent them in refusing to process grievances in connection with the alleged violations under the existing agreement and in the negotiation of the subsequent agreement?

Were the conduct of the labor union and the employer in the circumstances and the rights the plaintiffs were seeking to enforce subject to the Labor Management Relations Act of 1947, and to the exclusive jurisdiction of the Federal tribunals under the Act?

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Supremacy Clause, Article VI, Clause 2, set forth in Appendix A, page 21.

The statutory provisions involved are Sections 7, 8(a), 8(b), 9(a), 10(a) and 10(c) of the Labor Management Relations Act of 1947, 61 Stat. 136 et seq.; 29 U.S.C.A. 157, 158(a), 158(b), 159(a), 160(a) and 160(c), set forth in Appendix A, pages 21 to 25.[1]

STATEMENT OF THE CASE.

An action in equity was instituted by Petitioners above-named, as plaintiffs, individually, and as representatives of a class of fellow workers referred to as "large employees," against the Respondents, Struthers Wells Corporation; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, of America (A.F.L.-C.I.O.); Local Lodge 636 thereof; Rus-

[1] It may be noted that the 1959 amendments to Sections 8(a) and 8(b) of the Labor Management Relations Act of 1947, which became effective 60 days after September 14, 1959, did not change the provisions in any manner relevant to the matter presented, and, in any case, they do not apply because the cause of action arose before the said effective date.

sell A. Graham, individually; Lee A. Reisinger, Donald E. Chapel and Harry A. Wiles, individually, and as representatives of a class, as defendants.

The complaint filed sets forth in detail the occurrences giving rise to the action, and the pertinent facts here may be summarized as follows. The plaintiff forge employees were employed by the employer in its forge division, which was located in the same community near the iron works division operated by the employer (38-39). Different, but related, work was performed in each division; but the employees of both—forge employees and iron works employees—constituted one unit for collective bargaining purposes, the union defendants being the statutory collective bargaining agent for the unit (38). A separate seniority list had been established for each of the divisions in the unit since 1945 under various successive agreements, including the 1957 agreement executed June 19, 1957, which was to expire on May 31, 1959 (41).

Following a request by the employer in early August, 1957, that the seniority lists be combined, and without any formal action being taken by the union with relation thereto, the employer began in that month the transferring of certain machinery and work, which for many years had been located and performed at the forge division, to the iron works division (46, 47). The employer hired new employees to perform the transferred work—the new employees being designated as iron works employees—and laid off forge employees who had been performing the work (47). The transfers continued with the increase of the complement of the iron works employees, and the decrease of the forge employees; and by September, 1958, the number of iron works employees had increased

from 150 to 215, while the number of forge employees had decreased from 108 to 32 (39, 40, 59). The work transfer continued until April 1, 1959, when no operations were carried on at the forge division, with all of the forge employees having been furloughed, while, at the same time, the machines and orders customarily worked by them, were being serviced at the iron works division by the iron works employees, including those employed since August, 1957 (63).

The complaint details the conduct of the union and union leadership with relation to the work transfer, alleged to be in violation of the existing 1957 agreement, including the continued refusal of the union leadership to process a written grievance concerning the work transfer without recognition of the seniority rights of the forge employees (54-57); the hostile and arbitrary attitude manifested against the forge employees (48, 49, 56-59); and the discriminatory treatment accorded to them (48-49). The complaint avers that this conduct was motivated by the desire of the iron works employees including the union official in charge, who was an iron works employee, to further their interest as against the interest of the forge employees (48-49).

During the period of the work transfer the employer continued to urge the union to agree upon a combined seniority list, although it also repeatedly assured the forge employees of continued employment for the term of the 1957 agreement, and represented to those with greater seniority that employment for them would continue for an indefinite future period irrespective of any action of the defendant union on the seniority list (51-52).

Statement of the Case

On January 19, 1959, the employer presented to the union a proposal to establish a new combined seniority list under which the forge employees would be placed at the bottom of the iron works employees' list, although the forge employees would retain credit for length of service for vacation and other benefits (60). Thereafter, the employer urged the adoption of this proposal; and in early April, 1959, when the employer and union began negotiating the new collective bargaining agreement, the employer's representatives stated to the union representatives that unless the seniority issue was first disposed of, in accordance with the employer's proposal, that it would refuse to further negotiate and would bring to a close all operations (63).

The described conduct of the union and union leadership culminated in its adopting a consolidation plan on May 2, 1959, under which, from May 1, 1959, the unit would have a general seniority list, in which the seniority of all forge employees would begin as of May 1, 1959 (63-64).

The forge employees expended various efforts to have the grievance concerning their seniority rights processed in accordance with the 1957 agreement through the defendant local union, and later, the defendant international (54-59). Thereafter, they instituted proceedings with the international union for an investigation of all of the various activities of the local union, culminating in the action on seniority taken May 2, 1959 (64-66); but no final decision was ever reported by the international, as promised, although the union defendants later executed the 1959 agreement, effective for the period from June 1, 1959, through July 31, 1960, in which the seniority plan

adopted May 2, 1959, and the subject of the complaint to the international, was formally put into effect (66). The plaintiffs alleged that they had exhausted all remedies available to them under the constitution and bylaws of the defendant unions, averring the specific facts with relation thereto (64-69).

The forge employees continued to be laid off from April 1, 1959, when all operations at the forge division had ceased; and in the action claimed irreparable loss for loss of wages; loss of vacation pay; loss of rights on reinstatement, and advancement; and loss of accumulated severance pay rights, with relation to which they asked for an adjudication concerning their seniority rights, for damages, and for specific and other appropriate relief (63, 70-71, 76-77).

Preliminary objections were filed by the union and employer raising issues on jurisdiction, demurrer, misjoinder of causes of action, motion to strike and motion for a more specific complaint. On December 26, 1961, the lower court entered an order sustaining the preliminary objections to the jurisdiction of the court and in the nature of a demurrer to the complaint, and dismissed the action (29, 158a). An appeal was taken from this order by the forge employees to the Supreme Court of Pennsylvania, following which it entered the final judgment with relation to which this Petition is presented (35).

HOW FEDERAL QUESTION IS PRESENTED

In the preliminary objection to jurisdiction, the employer and union challenged the state court's jurisdiction

(95, 100); and the lower court sustained this objection, concluding "that jurisdiction in this matter is in the National Labor Relations Board, and that the state courts must yield thereto." The lower court also sustained the preliminary objection in the nature of a demurrer on the ground that the complaint did not state a cause of action against the defendants, because the union action culminating in the 1959 agreement, was authorized by majority vote.[1]

The Supreme Court of Pennsylvania affirmed the order of the lower court dismissing the complaint, ruling, however, only on the jurisdictional issue raised, and holding on the authority of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S. Ct. 773 (1959), and *Local 100 of the United Association of Journeymen and Apprentices v. Borden*, 373 U.S. 690, 83 S. Ct. 1423 (1963), that a state court would have no jurisdiction in the case, because the concerned activity was arguably subject to the L.M.R.A.[2] Two Justices dissented, without opinion.

REASONS FOR GRANTING THE WRIT

(A) The Importance of the Question

The present case provides the text for the determination of a matter of vital concern to all individual em-

[1] See certified printed record, pages 147a, 157a.

[2] The employer submitted an affidavit in the lower court to establish that it met the jurisdictional yardsticks of the N.L.R.B. See certified record.

ployees as represented parties in the collective bargaining agreement as against the union and the employer, with relation to the enforcement of their rights under any existing agreement and the protection of their interests in the negotiation of such agreements. More particularly, the case is concerned with the remedy available to individual employees when the collective bargaining agent fails to discharge its duty to fairly represent them as members of the bargaining unit, by refusing to process grievances or to take other necessary steps for the adjudication of contract breach claims relating to seniority rights against the employer and by negotiating a subsequent agreement which essentially incorporated as a contract provision the complained-of treatment and extinguished accumulated seniority and related rights.

It should be emphasized that while the complaint sets forth considerable detail concerning the occurrences from the date of the work transfers claimed to be in violation of the existing agreement, that the gravamen of the action was the failure of the union to fairly represent the plaintiff class with relation to their seniority rights under the existing agreement and in the negotiation of the subsequent agreement in circumstances that had no relationship to protected or prohibited activity subject to the provisions of Section 7 or Section 8 of the Labor Management Relations Act of 1947. The case is therefore concerned with whether or not an alleged breach of the duty of fair representation, in and of itself, and apart from activity which is either specifically protected or prohibited under the Act, is subject to the exclusive remedial reach of the L.M.R.A., and within the exclusive jurisdiction of the National Labor Relations Board.

This Court has established that the concomitant of the broad scope of a union's authority as the exclusive bargaining agent for the employees in a bargaining unit under such decisions as *J. I. Case Company v. National Labor Relations Board*, 321 U.S. 332, 64 S. Ct. 576 (1944), is the right of the individual member of the bargaining unit to be fairly represented within the range of the union's authority to act on his behalf. *Steele v. Louisville and N. R. Company*, 323 U.S. 192, 65 S. Ct. 266 (1944); *Ford Motor Company v. Huffman*, 345 U.S. 330, 73 S. Ct. 681 (1953); and *Syres v. Oil Workers International Union, Local No. 23*, 350 U.S. 892, 76 S. Ct. 152 (1956).

While the duty of the collective bargaining agent to fairly represent has been clearly established, the cases in which relief has been granted for the alleged breach of the duty have been relatively few; and apart from cases decided under the Railway Labor Act, there has been no definitive determination as to whether the remedy for the breach is through appropriate equity court proceedings or a matter for the exclusive determination of the National Labor Relations Board under the provisions of the L.M.R.A. The most authoritative decisions support the position that the remedy is through the courts.

The *Syres* case, supra, strongly indicates—if it does not decide—that the breach of the duty of fair representation is the subject of appropriate court proceedings. In that case the district court dismissed for lack of jurisdiction a declaratory judgment proceeding instituted to declare void a labor contract alleged to have been negotiated by the bargaining agent without fairly representing the plaintiff class in the unit. The decision was affirmed on appeal, on the ground that there was no basis for jurisdic-

tion by a Federal court, the case not requiring the construction of the National Labor Relations Act or other Federal law, and involving only an issue of whether or not the defendants had violated a private contract. The dissenting opinion filed declared that the N.L.R.A., entered into the making of the contract because of the exclusive bargaining agency established pursuant to the Act, and concluded that the alleged discrimination was not within the specific unfair labor practices defined in the Act and could not be adequately remedied by the Board.

On petition for writ of certiorari to the Supreme Court, the writ was granted per curiam; the judgment of the court of appeals was reversed; and the case remanded to the district court for further proceedings, citing *Steele v. Louisville and N. R. Company*, supra; *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210, 65 S. Ct. 235 (1944); *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768, 72 S. Ct. 1022 (1952).

Further, in a number of instances, the Federal courts have taken jurisdiction of actions based only on the breach of the duty to fairly represent. *Whitfield v. United Steelworkers of America, Local No. 2708 and others*, 263 F. 2d 546 (1959), cert. denied, 360 U.S. 902, 79 S. Ct. 1285 (1959); *Hardcastle v. Western Greyhound Lines*, 303 F. 2d 182 (1962). See also *Britt v. Trailmobile Company*, 179 F. 2d 569 (1950), cert. denied, 340 U.S. 820 (1950). A state court took jurisdiction in such a case in *Cortez v. Ford Motor Company*, 349 Mich. 108, 84 N.W. 2d 523 (1957).

The case of *Holman v. Industrial Stamping and Manufacturing Company*, 344 Mich. 235, 74 N.W. 2d 322 (1955), is sometimes viewed as a breach of fair representation

case in which the state court held that it did not have jurisdiction, but the issue in the case was actually concerned with whether or not previous seniority rights under contracts could be affected by subsequent negotiations following the certification of a new bargaining representative; and the refusal of jurisdiction was related to that issue. Subsequent to the decision of the Michigan Supreme Court, a similar action was instituted in the United States District Court in *Hyleman v. Industrial Stamping and Manufacturing Company*, 142 F. Supp. 215 (1956); and the District Court, in a somewhat confusing opinion, in which the discussion is not always identified with the issue presented, generally declared that all complaints of discrimination are within the exclusive jurisdiction of the N.L.R.B.

Under the L.M.R.A., the N.L.R.B. clearly has jurisdiction to remedy discrimination which is violative of Section 8(a)(3) or 8(b)(2) (discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.[1] However, the N.L.R.B., until the recent case of *Miraclu Fuel Company*, decided December 19, 1962, 140 N.L.R.B. No. 7, by the full Board, with two members dissenting, has never indicated that the breach of the duty of fair representation, in and of itself, and without relation to protected or prohibited conduct under Section 7 and Section 8 of the Act, was subject to its jurisdiction as an unfair labor practice. It should be stated that the

[1] It has been indicated that the decision of the union's certification by the Board may, in some circumstances, be an appropriate remedy in such cases. *Wallace Corporation v. National Labor Relations Board*, 323 U.S. 248, 65 S. Ct. 328 (1944); *Hughes Tool Company v. N.L.R.B.*, 147 F. 2d 69 (C.C.A. 5th, 1945).

Board has interpreted the statute to give it authority to revoke certification where the duty of fair representation is breached by racial discriminations. *Larus and Brother Company*, 62 N.L.R.B. 1075 (1945). It must be observed, however, that any authority to decertify for failure to fairly represent has been most rarely exercised; and there is no other authority vested in the Board under the Act in the absence of the specified unfair labor practices.

In the *Miranda Fuel Company* case, the Board by a three-two decision held that discriminatory conduct which it found to be violative of Section 8(b)(2) and Section 8(a)(3) (discrimination to foster or discourage union activity), was also violative of Section 8(b)(1)A and Section 8(a)(1) (interference with concerted activity rights), on the rationalization that under Section 9 of the Act, the statutory bargaining representative is charged with the duty to represent the interests of all of the employees in the bargaining unit fairly and impartially; that Section 9 must be read into the rights guaranteed employees by Section 7 so that any default in Section 9 is correspondingly an infringement upon a Section 7 right; and that the infringement is, therefore, violative of Section 8(b)(1)A and Section 8(a)(1).

The dissenting members of the Board viewed the position advocated by the majority as "an unwarranted extension of Board authority." Recognizing that Section 9 of the Act does impose the indicated obligation upon a statutory representative and that the Board has authority in the exercise of the powers granted to it in that Section to insure compliance with that obligation by withholding or revoking certifications, the dissenting members conclude that the Section 9 duty of fair representation cannot prop-

erly be read into Section 7, and that even if it could, it does not follow: "That the prohibitory provisions of Section 8(a)(1) or 8(b)(1)A, or even all the provisions of Section 8, provide a remedy for all incursions upon those rights, or make the Board the exclusive guardian of those rights." The dissent concluded:

> "In situations where employees have been the victims of truly arbitrary or invidious discrimination at the hands of their statutory bargaining representative, with or without the employer acquiescence, they are not without recourse. This is true even where that arbitrary or invidious action is unrelated to legitimate union or other concerted activities protected by the Act. The courts have furnished, and do furnish, a remedy.[1] Congress has throughout the years indicated no dissatisfaction with this remedial scheme."

In assessing the indeterminate status of the matter, it is to be noted that in the recent case of *Local 100 of the United Association of Journeymen and Apprentices v. Borden*, supra, this Court expressly refrained from passing upon the correctness of the position taken by the majority or its applicability in the circumstances of the *Miranda* case.

The absence of a definitive decision by this Court as to the forum and remedy for this undoubted right, with the uncertainty now magnified by the recently announced new position of the divided Board, in a very real sense denies *any* relief or recourse for individual employees in the position of the plaintiffs in this case. Further, it re-

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[1] The Dissent cites to this effect: *Steele v. Louisville and N. R. Company*, supra; *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, supra; and *Syres v. Oil Workers International Union, Local No. 23*, supra.

tard's the proper and necessary development of the law to secure individual employee rights as against the "strength that has been accorded to numbers" under the Federal labor legislation.

It is fair to say that the paucity of cases in this area cannot be taken as evidence of the uniform proper discharge of the duty by the representative, but rather as a manifestation of the lack of the full development of the processes to remedy any failure, with the result that there is no legal assurance that the granted authority will be measured by the responsibility from which it springs.

(B) The Pennsylvania Decision Is Not in Accord With the Labor Management Relations Act

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Because the opinion of the Pennsylvania Supreme Court fails to set forth what basis the majority believed the complained activity was subject to Section 7 or Section 8 of the L.M.R.A., it is impossible to determine what protected or prohibited activity was arguably involved in the case according to its view. Further, although the plaintiffs throughout based their claim upon the breach of the duty by the union to fairly represent them in circumstances "unrelated to legitimate union or other concerted activities protected by the Act," and the employer's wrongful participation in that breach, the opinion fails to specifically treat that basis of the claim for jurisdiction.

Instead, the Pennsylvania Court evidently applied the interpretation of the *San Diego Building Trades Council*

v. Garmon, supra, which it has developed in a series of cases that "arguably subject" activity within the primary jurisdiction of the N.L.R.B., is in effect any activity involving employment status which is not within the exceptions as defined in such cases as *United Construction Workers v. Laburnum Construction Corporation*, 347 U.S. 656, 74 S. Ct. 833 (1954); *International Association of Machinists v. Gonzales*, 357 U.S. 617, 78 S. Ct. 923 (1958); and *Smith v. Evening News Association*, 371 U.S. 195, 83 S. Ct. 267 (1962). The rule was thus stated in *Baker v. Shoppmen's Local Union No. 455*, 403 Pa. 31 (1961), a case in which the claimed discrimination was in the context of activities specifically protected or prohibited by the Act, as follows:

> "In the instant case, the plaintiffs charge the defendants with conspiracy and activities to injure their employment status through deprivation of seniority rights. Call it discrimination, a breach of duty, unfair dealing, or by any other name, that is the basic element of the cause stated. Relief and damages are sought for an alleged unlawful interference by the union and the employer with rights the plaintiffs are entitled to as employees. This is an unfair labor practice." (page 36)

See also *Smith v. Pittsburgh Gauge and Supply Company*, 412 Pa. 171, 178, 194 A. 2d 181 (1963), in which, again, under the facts the discriminatory action was very evidently subject to the Act.

The broad scope of activity assigned to the primary jurisdiction of the N.L.R.B. under the Pennsylvania Court interpretation is not founded on the provisions of the law,

as written, or the decisions of this Court. It represents an unwarranted extension of the definition of the activities and conduct subject to the Act and the jurisdiction of the National Labor Relations Board, with the result that almost nothing, rather than "much," is left to the states in the broad area of labor activity.

With specific relation to the present case, the rule fails to distinguish between the discrimination within the reach of the L.M.R.A., i.e., that which has as its object encouraging or discouraging union activity[1] and other discrimination, a distinction that underlies all of the decisions relating to that section. *Radio Officers Union v. National Labor Relations Board*, 347 U.S. 17, 74 S. Ct. 323 (1954); *Intermountain Equipment Company v. National Labor Relations Board*, 239 F. 2d 480, 483 (C.C.A. 9th, 1956); *National Labor Relations Board v. Intracoastal Terminal, Inc.*, 286 F. 2d 954, 958 (C.C.A. 5th, 1961).

The Pennsylvania Supreme Court also failed to give proper consideration to the contract aspect of this case. The conduct initiating the plaintiffs' complaint were the work transfers alleged to constitute breaches of the existing contract which was not to expire for more than a year. Further, the specific failure of the union in this regard was its refusal to process a grievance to have the matter adjudicated, a necessary prerequisite to any action to enforce the contract provisions, which, under the terms of the contract under pertinent rulings, only the union had the standing to enforce. *Falsetti v. Local Union No. 2020, U.M.W.A.*, 400 Pa. 145, 168 (1960).[1] As a result of the

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[1] See also *Parker v. Borock*, 5 N.Y. 2d 156, 156 N.E. 2d 287 (1957); *Cortez v. Ford Motor Company*, supra; *Jacquess v. Pennsylvania Railroad Company*, 25 N.J. 541, 138 A. 2d 24 (1958).

very breach of duty claimed, it was legally impossible for the individual employees, in any manner, to realize their rights under the contract.

Inasmuch as the remedy for breach of contract is not within the exclusive jurisdiction of the National Labor Relations Board, *Smith v. Evening News Association*, supra; *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation*, 348 U.S. 437, 444, 75 S. Ct. 489, 492 (1955), this action against the union, based upon its failure to secure the remedy for the plaintiffs' must likewise not be within its exclusive jurisdiction.[3]

It is evident that the duty of fair representation, in and of itself, is not arguably subject to the exclusive jurisdiction of the National Labor Relations Board as an unfair labor practice. This duty is not set forth in the specific sections describing protected and prohibited activity and cannot be reasonably read into these provisions.

The rights claimed in this case, involving principles of contract law, fiduciary responsibility and exhaustion of intraorganizational remedy cannot be equated with the specialized rights governed by the L.M.R.A., with relation to which the expertise of the N.L.R.B., is applied. Further, the limited remedies of decertification and something less than compensatory payment cannot provide the re-

[3] Apart from the plaintiffs' being unable to enforce their rights under the existing 1957 agreement, the status of their rights on its termination was doubtful, to say the least, when as a result of the work transfers and the enlargement of the numbers of the iron works employees, the subsequent 1959 agreement incorporated as a contract provision the very treatment of which complaint had been made.

coveries and relief required to fully secure the right claimed.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

Article VI, Clause 2, of the Constitution of the United States, provides as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State, shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Section 7 of the Labor Management Relations Act of 1947, 61 Stat. 136 et seq., 29 U.S.C.A. 157 provides as follows:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

Statutes and Constitutional Provision Involved

Section 8(a) of the Labor Management Relations Act of 1947, 29 U.S.C.A. 158(a) provides as follows:

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title:

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: . . . (includes a proviso not here pertinent)

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . . (includes a proviso not here pertinent)

"(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this sub-chapter;

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

Section 8(b) of the Labor Management Relations Act of 1947, 29 U.S.C.A. 158(b) provides as follows:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not im-

pair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

"(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: . . . (various objects are then listed)

"(5) to require of employees covered by an agreement authorized under subsection (a)(3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances . . .

"(b) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed."

Section 9(a) of the Labor Management Relations Act of 1947, 29 U.S.C.A. 159(a) provides as follows:

"(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment."

Section 10(a) of the Labor Management Relations Act of 1947, 29 U.S.C.A. 160(a) provides as follows:

"(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that

has been or may be established by agreement, law or otherwise: . . ." (Includes a proviso not here pertinent)

Section 10(e) of the Labor Management Relations Act of 1947, 29 U.S.C.A. 160(e), provides as follows:

"(e) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of subsection (a) (1) or (a) (2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. . . ."

APPENDIX B

OPINION OF THE SUPREME COURT OF PENNSYLVANIA

(Reported 412 Pa. 211)

Opinion by Mr. Justice Benjamin R. Jones, October 17, 1963:

Three employees (Employees) of the Struther Wells Corporation (Employer), members in good standing of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (A.F.L.-C.I.O.) (International) and Local 636 thereof (Local), on their own behalf and as representatives of the employee-class known as "Forge Employees," instituted an equity action in the Court of Common Pleas of Crawford County against the Employer, the International, the Local and certain International and Local officials.

The complaint averred, inter alia, that: under a collective bargaining agreement between the Employer, the International and the Local, *effective from June 15, 1957 to May 31, 1959*, the Employees were divided into two separate seniority rosters, namely, Forge Weldment Division and Iron Works Division; at a meeting held on May 2, 1959, a majority of the membership of the Local in attendance ratified a *new* seniority provision, known as Article II, of a proposed *new* supplemental collective bargaining agreement which agreement, effective June 1, 1959,

executed on September 23, 1959 was adopted by the Employer, the International and the Local: Article II of this *new* agreement eliminated the system of separate seniority rosters theretofore existing between Forge Employees and Iron Works Employees and provided that employees of the Forge Weldment Division seniority list would, as of May 1, 1959, be placed at the bottom of a consolidated seniority list, while still retaining overall length of service for vacation purposes: the Employer, engaged in the construction and manufacture of boilers and high-pressure vessels in various plants, operated a Forge Division at its Forge shop in Titusville, Crawford County, and an Iron Works Division at its Iron Works shop, located close by in Titusville: the Employees were employed in Employer's Forge Division at the Forge shop in Titusville: in August, 1957, the Employer began to move its machinery and work, which had been performed prior thereto in the Forge shop of the Forge Division, to the Perry Forge shop and the Iron Works shop: in these latter shops, Forge employees were furloughed and additional Iron Works employees were engaged: by April 1959, all operations at the Forge shop had ceased and the machines and orders on which the Forge employees had customarily worked were being serviced at the Iron Works shop and the Perry Forge shop by Iron Works employees, many of whom had less seniority than the Forge Employees under the collective bargaining agreement of 1957: the furloughed Forge employees, who were thus out of work from April, 1959 to the date of filing the complaint in August, 1960, would have been employed during that entire period and many of the other Forge employees would have been employed for a larger period of time but for the action taken by the Employer, the Unions and the named Union officials.

The complaint further alleged that: the Employer's actions in transferring the work and machinery from the Forge Division shop, culminating in a termination of the work of the operators there on or about April, 1959, with the consequent laying off of the Forge employees who would otherwise have been employed there, constituted a permanent discontinuance of the department, entitling the furloughed employees to severance pay; the Employer's actions, in establishing a consolidated seniority list was arbitrary and discriminatory against the Forge employees and wrongfully deprived them of their rights under the 1957 agreement and, by increasing the representation of the Iron Works employees and weakening the representative strength of the Forge employees, the latter were deprived of their rights as members of a bargaining unit; the International and the Local acted improperly and wrongfully in adopting the consolidated seniority list which was arbitrary and discriminatory as to the Employees and caused them to lose their seniority status; the Unions breached their duty to fairly represent all members of the bargaining unit, including Employees; the Local's actions, approved by International, were directed by certain named executive officers of the Local who, by reason of hostility, failed to press the Employees' grievances and treated the Forge employees' seniority and other rights in bad faith, fraud and discrimination so as to deprive them of their rights; these officers of the Local acted in concert with the Employer to the Employees' detriment, the Local's action being approved by the International.

The relief requested was several-fold: (1) reinstatement to positions, classifications, seniorities and related rights, including rights under the 1957 and 1959 collective

bargaining agreements: (2) payment of back wages and vacation pay and/or severance pay: (3) payment of costs and counsel fees: (4) injunctive relief restraining all the defendants from (a) retaliation against the Employees and (b) doing any acts in derogation of the Employees' rights.

Preliminary objections to the complaint were filed which averred, inter alia, that: (1) the matters complained of were *exclusively* within the jurisdiction of the National Labor Relations Board: (2) that the complaint (a) failed to set forth a cause of action and (b) combined causes of action ex contractu and ex delicto.

The court below sustained the preliminary objections and concluded, inter alia, that the matters complained of were *exclusively* within the jurisdiction of the National Labor Relations Board and not within the jurisdiction of the state court and that the complaint did not set forth a justiciable cause of action. From the order dismissing the complaint this appeal was taken.

In Smith v. Pittsburgh Gage and Supply Company, 412 Pa. 171, A. 2d , we reviewed recent rulings of the United States Supreme Court on the scope of the jurisdiction of state courts in cases where the activity complained of is arguably subject to the protections of Section 7 or the prohibitions of Section 8 of the National Labor Relations Act.[1] In Smith, we said (p. 174): "The basic rule delineating jurisdiction in this area of the law was recently reiterated by the United States Supreme Court in Local 100 v. Borden, 373 U.S. 690, 693, 83 S. Ct. 1423,

[1] Act of July 5, 1935, c. 372, 49 Stat. 449, as amended, 29 U.S.C. §§157, 158.

1425." 'This Court held in San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S. Ct. 773, that, in the absence of an overriding state interest such as that involved in the maintenance of domestic peace, state courts must defer to the exclusive competence of the National Labor Relations Board in cases in which the activity that is the subject matter of the litigation is arguably subject to the protections of §7 or the prohibitions of §8 of the National Labor Relations Act.' The rationale of that rule is clear: in its promulgation of rules governing the relations of labor and management as such affect interstate commerce, 'Congress did not merely lay down a substantive rule of law to be enforced by *any* tribunal competent to apply law generally to the parties. It went on to confide *primary* interpretation and application of its rules to *a specific and specially constituted* tribunal [the National Labor Relations Board] . . . Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid those diversities and conflicts likely to result from a variety of procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.' (Emphasis supplied.) Garner v. Teamsters, Chauffeurs and Helpers, 346 U.S. 485, 490, 491, 74 S. Ct. 161, 165, 166. In San Diego Building Trades Council v. Garmon, supra, Mr. Justice Frankfurter (79 S. Ct. 778) stated: 'In determining the extent to which state regulations must yield to subordinating federal authority, [the Court has] been concerned with delimiting areas of potential conflict: potential conflict of law, of remedy, and of administration' and that

'[w]hen the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the states from acting. [citing cases.]'

"The U. S. Supreme Court has established a yardstick for determining when 'due regard for the federal enactment requires that state jurisdictions must yield', i.e., 'when an activity is *arguably* subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board.': (Emphasis supplied.) Garmon, supra, 79 S. Ct. 780. See also: Marine Eng. Ben. Association v. Interlake Steamship Co., 370 U.S. 173, 82 S. Ct. 1237.

"To the general rule defining jurisdiction, the U. S. Supreme Court has recognized exceptions in the case of certain activities, even though such activities are arguably, or even concededly, within the protections of §7 or the prohibitions of §8 of the Act. As examples, the Garmon rule has been held inapplicable or irrelevant (a) where the activity consists of 'conduct marked by violence and imminent threats to the public order' (United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656, 74 S. Ct. 833; United Automobile Workers v. Russell, 356 U.S. 634, 78 S. Ct. 932); (b) where actions are brought on collective bargaining contracts under §§301, 303 of the Labor Management Relations Act of 1947 even though arguably, or even concededly, unfair labor practices are involved therein, (Dowd Box Co. v. Courtney, 368 U.S. 502, 82 S. Ct. 519; Local 174 v. Lucas Flour Co., 369 U.S. 95, 82 S. Ct. 571; Atkinson v. Sinclair Refining Co., 370 U.S. 238, 82 S. Ct. 1318; Smith v. Evening News Association, 371 U.S.

195, 83 S. Ct. 267): (c) where 'the lawsuit [is] focused on purely internal union matters, i.e., on relations between the individual plaintiff and the union not having to do directly with matters of employment and . . . the principal relief sought [is] restoration of union membership rights.' (International Association of Machinists v. Gonzales, 356 U.S. 617, 78 S. Ct. 923)."

In the case at bar, the activities of which the Employees complain are, at least arguably, subject to Sections 7 or 8 of the National Labor Relations Act and within the protection of Section 10 of the Act and, therefore, unless such activities fall within one of the exceptions to the general basic rule, the state court is without jurisdiction in this action. Our inquiry is to determine whether the instant complaint spells out an activity falling within any of the exceptions to the general rule.

Clearly, the activities herein complained of do not consist of "conduct marked by violence and imminent threats to the public order" under Laburnum or Russell, supra, nor is "the lawsuit focused on purely internal union matters . . . not having to do directly with matters of employment" wherein the principal relief sought is the restoration of union membership rights under Gonzales, supra.

Lastly, does the complaint bring the case at bar within the class of actions based on collective bargaining agreements under Section 301 of the Labor Management Relations Act of 1947[2] whereof the United States Supreme Court has recently spoken in Smith v. Evening News Association, 371 U.S. 195, 83 S. Ct. 267, 9 L. Ed. 2d 246.

[2] Act of June 23, 1947, c. 120 et seq., 61 Stat. 136, 29 U.S.C. §185.

In Evening News Association, supra, the Supreme Court held that, even though the activity which allegedly constituted the breach of a collective bargaining agreement was *concededly* an unfair labor practice under the the National Labor Relations Act, supra, a common law action by an individual employee member of a labor organization against the employer for damages for breach of a collective bargaining agreement between such labor organization and the employer in an industry affecting interstate commerce could be entertained in a state court. As a result of Evening News Association it is now clear that the common law jurisdiction of state courts to entertain suits upon collective bargaining contracts (brought or held to arise under Section 301 of the Labor Management Relations Act, supra), is not excluded either by the jurisdiction of the National Labor Relations Board or of the Federal Courts.

However, the *only* actions which fall within that class of actions to which state courts' jurisdiction extends under the rationale of Evening News Association are "[s]uits for *violation of contracts* between an employer and a labor organization representing employees in an industry affecting commerce . . . , or between any such labor organizations . . .": (Emphasis supplied) Section 301 of the Labor Management Relations Act, supra, 29 U.S.C. 185. If the action is not based upon a *violation* of the terms and provisions of a collective bargaining contract or agreement between a labor organization and an employer, then the state court has no jurisdiction. In Schatte v. International Stage Employees and Moving Picture Machine Operators, 84 F. Supp. 669, aff'd 182 F. 2d 158, reh. den. 183 F. 2d 685; cert. den. 340 U.S. 827, 71 S. Ct. 64, reh. den.

340 U.S. 885, 71 S. Ct. 194, the court stated (84 F. Supp. 672): "any right of recovery under Section 301 must rest upon a *contract* and its asserted violation. The whole Act relates to labor contracts, hence it must be a contract contemplated by the Act, i.e., a collective bargaining contract or contract relating to fair or unfair labor practices." The plain and unambiguous language of the statute compels no other conclusion.

The real crux of the Employees' complaint is stated in paragraph 20 of their complaint: "The execution of the 1959 Agreement, and the actions and agreements of the [Employer] and the [International and Local] with relation to the seniority rights of the [Employees], the Forge Employees, were invalid, improper, void and illegal, for the reasons and averments hereinafter set forth, and resulted in the loss of all of the seniority rights of the [Employees] which they had accumulated prior to May 1, 1959 . . ." Neither in paragraph 20 nor in any other portion of the complaint is there an averment of a *violation* of the 1959 collective bargaining agreement between the Unions and the Employer. The thrust of the complaint is an attack upon the conduct of both the Unions and the Employer in the negotiations and the incidents which led to and resulted in the formulation of the new seniority provisions in the 1959 agreement and a challenge to the bona fides of the Employer and Union vis-a-vis the Employees. In effect, the complaint seeks a rescission of the seniority provisions in the 1959 collective bargaining agreement[a] allegedly brought about by improper conduct

[a] "There is no natural or vested right to seniority. Seniority arises only as a result of a contract express, or clearly implied: [citing cases]." Fawcett v. Monongahela Railway Co., 391 Pa. 134, 136, 137 A. 2d 768.

on the part of the Unions and the Employer and the reinstatement of the pertinent seniority provisions of the 1957 collective bargaining agreement. However, no *violation* of the collective bargaining agreement between the Unions and the Employer is averred and, absent such an averment, the instant case is clearly not within the class of actions contemplated by Section 301, supra, and the rationale of Evening News Association, supra.

An examination and a study of this complaint clearly reveals that the basic general rule which excludes the jurisdiction of state courts applies, and that the Employees' *exclusive* forum is the National Labor Relations Board and not the state courts. The Garmon rule commands the exclusion of this action from the jurisdiction of the state courts and the court below properly dismissed the complaint for lack of jurisdiction.

That which the Supreme Court said in Borden, supra (373 U.S. 698) is presently applicable: "In the present case the *conduct* on which the suit is centered, whether described in terms of tort or contract, is conduct whose lawfulness could initially be judged only by the federal agency vested with exclusive primary jurisdiction to apply federal standards."

In view of the conclusions reached, consideration need not be given to other questions raised by the preliminary objections.

Order affirmed. Each party to pay own costs.

Mr. Chief Justice Bell and Mr. Justice Musmanno dissent.

APPENDIX C

COMPLAINT

The Plaintiffs bring this action in equity, for themselves, individually, and for and on behalf of the class hereinafter described of which they are members, on causes of action of which the following is a statement:

1.

The Plaintiff, F. J. Cosmark, is an individual who resides at 405 North Kerr Street, Titusville, Pennsylvania; the Plaintiff, John C. Martin, is an individual who resides at 743 Garden Street, Titusville, Pennsylvania; and the Plaintiff, Melvin D. Patterson, is an individual who resides at R. D. No. 1, Diamond, Pennsylvania.

At all times hereinafter mentioned, the Plaintiffs and the class which they represent were employees of the Defendant, Struthers Wells Corporation, and members in good standing of the Defendant, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers of America, and Local Lodge 636 thereof; the said class which they represent will hereinafter be referred to as "Forge Employees," being hereinafter further described.

2.

The Defendant, Struthers Wells Corporation, hereinafter referred to as "Employer," is and was at all times

hereinafter mentioned, a business corporation, maintaining its principal place of business in Titusville, Crawford County, Pennsylvania, and is engaged in the fabrication, construction and manufacture of boilers and high pressure vessels, maintaining various plants in the City of Titusville in which it carries on the said activities.

3.

The Defendant, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers of America (A.F.L. C.I.O.), hereinafter referred to as the "International," is an unincorporated association, being a voluntary association together of workers for collective bargaining purposes and is the parent labor organization composed of workers associated together and organized in local or subordinate unions or lodges, chartered as subordinates, by the International which consists of all of the subordinate local unions or lodges, the members of which are, by virtue of being such, the membership of the International which is governed by the membership through, and by means of, representative and democratic processes.

The International headquarters and the offices of the President of the said International are in the New Brotherhood Building, Eighth Street and State Avenue, Kansas City 11, Kansas.

The International is territorially divided into sixteen (16) sections, including the Allegheny section, which is composed of the states of Pennsylvania, New Jersey, Maryland and the District of Columbia, which is under the supervision of International Vice President J. V. Kearney, with offices located in Philadelphia, Pennsyl-

vania; and the International conducts its activities in Crawford County, Pennsylvania, through various local lodges, including Local Lodge 636.

4.

Local Lodge 636 of the Defendant International, hereinafter referred to as the "Local," is an unincorporated association, being a subordinate or local union or lodge chartered by the Defendant International as such and functioning as a labor organization for collective bargaining purposes. The offices of the Local are located in Titusville, Pennsylvania.

5.

The Defendant, Russell A. Graham, is an individual who resides at 304 North Franklin Street, Titusville, Pennsylvania, and is District Representative for the International in northwestern Pennsylvania, his functions including the servicing of the Local. In addition, during the major portion of the period pertinent to the Plaintiffs' causes of action, as hereinafter set forth, the said Defendant was the President of the Local.

6.

On and prior to June 19, 1957, the Defendant International and the Defendant Local constituted the statutory collective bargaining agent for the employees of the Defendant Employer in the unit composed of the employees of the Forge Division at the Forge Shop located at 617 East Central Avenue, Titusville, Pennsylvania, and the employees of the Iron Works Division at the Iron Works Shop located at 315 South Franklin Street, Titusville, Pennsylvania.

7.

The Plaintiff class is composed of those individuals who were the employees of the Forge Division on June 19, 1957, referred to herein as "Forge Employees," numbering approximately one hundred eight (108) men, and are so numerous as to make it impracticable to join all as parties Plaintiff.

For the purposes of the Plaintiffs' causes of action set forth herein, the Forge Employees stand in a similar position to the individual Plaintiffs, and the individual Plaintiffs can adequately represent them by reason of which this action is brought by the said Plaintiffs on behalf of the Forge Employees. Although this action is brought on behalf of all of the Forge Employees, there is added to this Complaint as a part hereof Exhibit 'A' which sets forth the names and the beginning dates of employment with the Forge Division of the members of the Forge Employees who have specifically requested that they be recorded as actively participating in this action with the named Plaintiffs.

8.

The Defendant, Lee A. Reisinger, is an individual who resides at Hydetown, Pennsylvania; the Defendant, Donald E. Chapel, is an individual who resides at Titusville, Pennsylvania; and the Defendant, Harry A. Wiles, is an individual who resides at 5 Second Street, Tidioute, Pennsylvania.

9.

At all times hereinafter mentioned, the individual Defendants, just named, and the class which they represent were employees of the Defendant Employer and members of the Defendant's International and Local; the said class

which they represent will hereinafter be referred to as "Iron Works Employees," being hereinafter further described.

9.

The Defendant class is composed of those individuals who were the employees of the Iron Works Division, on June 19 1957, who numbered approximately one hundred fifty (150) employees, and all the additional employees who were employed thereafter in said Division until May 1, 1959, when they numbered approximately two hundred fifty (250) and are so numerous as to make it impracticable to join all as parties Defendant. The Defendant, Lee A. Reisinger, is, at the present time, President of the Defendant Local; the Defendant, Donald E. Chapel, is, at the present time, Financial-Corresponding Secretary of the Defendant Local; and the Defendant, Harry A. Wiles, was at the time pertinent to the Plaintiffs' causes of action, Financial-Corresponding Secretary of the said Local; all of the said individual Defendants are employees of the Iron Works Division, and for the purposes of the Plaintiffs' causes of action set forth herein, the members of the Defendant class, referred to herein as "Iron Works Employees," stand in a similar position to the said individual Defendants for which reason and because of their respective offices the said individual Defendants can adequately represent the Iron Works Employees by reason of which this action is brought against them on behalf of the Iron Works Employees.

10.

By reason of the Defendant International and the Defendant Local being the statutory collective bargain-

ing agent for the employees of the Defendant Employer in the said unit, they function as the exclusive agent pursuant to the certification of the National Labor Relations Board dated May 16, 1947, under the pertinent federal labor statutes, and have been authorized by procedures pursuant to the said statutes to negotiate with the Defendant Employer, and, at all times pertinent hereto, have negotiated and now have in effect, an agreement containing a contractual provision requiring that all employees of the Defendant Employer in the said unit be members of the Defendants' International and Local.

11.

Commencing in 1945, the Defendant Employer and the Defendants International and Local established and put into practice a separate seniority list for each of the said divisions in the said unit, which established practice was reduced to writing and incorporated as a part of the various collective bargaining agreements executed between the said parties beginning on May 26, 1950, including the agreement executed on June 19, 1957, hereinafter referred to as "1957 Agreement," which continued into effect through May 31, 1959.

12.

The 1957 Agreement, inter alia, provided with relation to seniority under Article II, Section 1, thereof, the following provision which also appeared in the previous bargaining agreements as above mentioned:

"Seniority is defined as follows: (a) Length of continuous service with the Corporation for vacation

purposes. (b) Length of continuous service in any and all classifications within the bargaining unit, in all departments and shops of the plant, for purposes of lay-off, reinstatement and advancement within the jurisdiction of the Union. Each Division is to maintain a separate seniority roster. An Employee may be transferred by the Company from one division to another on a temporary basis for a period of not to exceed sixty (60) days without any change in his seniority status. Where an employee is so transferred for a period of over sixty (60) days, such transfer shall be deemed permanent unless an extension of said sixty (60) days shall be agreed to between the Company and the Union. However, in no case is an Employee to be transferred from one Division to another while an Employee is on lay-off from that Division or who holds or has previously held the same classification of the employee to be transferred."

13.

By virtue of the said seniority provision, on May 31, 1959, the termination date of the 1956 Agreement, the Forge Employees of the Defendant Employer had seniority rights of three (3) to fourteen (14) years, with an average seniority of approximately eight (8) years.

14.

The seniority rights of the employees in the said unit, under the provisions of the 1957 Agreement and the previous agreements, as above mentioned, determined the rights of an employee on lay-off, reinstatement, advancement, vacation and severance pay.

15.

The general provisions relating to seniority in the 1957 Agreement, including the provisions set forth in Article II, Section 1, set forth above, are set forth in Exhibit B, which is attached hereto and made a part hereof.

16.

The vacation rights and the severance pay rights, as determined by seniority under the 1957 Agreement, are set forth in Article VII and Article XVIII, respectively, of the said Agreement, a true and correct copy of each of which is attached hereto, marked Plaintiffs' Exhibits C and D, respectively, and made a part hereof.

17.

Although the 1957 Agreement expired on May 31, 1959, the Defendant Employer and the Defendants International and Local, on September 23, 1959, executed a new collective bargaining agreement which became effective as of June 1, 1959, and continued in effect through July 31, 1960, under which the separate seniority rosters established in 1945 were eliminated; and the names of all of the Forge Employees, the Plaintiffs herein, were placed at the bottom of the Iron Works Division seniority list as of May 1, 1959.

18.

The said agreement executed on September 23, 1959, hereinafter referred to as the "1959 Agreement," contained the following provisions in Article II, Sections 1 and 2, which terminated the seniority rights of the Forge Employees in the manner just described:

"Section 1. Service with the Company shall be defined as follows: (a) Length of continuous unbroken service with the Company for vacation purposes, which, for the purposes of this Agreement, shall hereafter be referred to as 'length of service.' (b) Length of continuous unbroken service with the Company within the bargaining unit, in all departments and shops of the plants, for purposes of lay-off, recall, shift preference and advancement within the jurisdiction of the Union, shall, for the purposes of this Agreement, be hereafter referred to as 'seniority.' (c) Continuous unbroken service, as used in this Section 1, shall be deemed to mean service not interrupted by discharge or other termination.

"Section 2. The separate seniority rosters provided for in prior Agreements are hereby eliminated. All employees of the Company whose names appear on the Forge Weldment Division seniority list as of May 1, 1959, shall be placed at the bottom of the present Iron Works Division seniority list, in their respective classifications, retaining, on such combined seniority list, their former positions with respect to each other. The combined seniority list shall henceforth be deemed to be one seniority list and shall be known as the 'seniority list.'

"Such former Forge Weldment employees shall retain all 'length of service' for vacation purposes, but their 'seniority' shall become effective as of May 1, 1959. In case of reduction of the Company's work force, former Forge Weldment employees who have been added to the new seniority list, as provided for

herein, shall be subject to layoff before former Iron Works Division employees whose names appear on the said new seniority list. Since all former Forge Weldment employees included in the new seniority list have the same 'seniority' date, they shall be subject to layoff in accordance with their position with respect to each other, commencing with the employee at the bottom and working upward.

"All new employees hired on or after May 1, 1959, shall be placed on the seniority list in their respective classifications, below the above referred to former Forge Weldment employees, and shall be subject to layoff prior to such former Forge Weldment employees.

"The Company may assign any employee on the seniority list to work as the Company finds him qualified in his job classification in any place at any time without affecting his seniority. However, in case the assignment is to work in a location away from what is generally known as the Iron Works and the employee declines to accept the assignment, he shall not be required to accept such assignment unless he is the most junior-in-seniority qualified employee then working. If he is the most junior-in-seniority qualified employee then working, he shall perform his work as assigned in such case."

19.

The said provisions relating to seniority in the 1959 agreement, including the provisions set forth in Article II, Sections 1 and 2, set forth above, are set forth in

Exhibit E, which is attached hereto and made a part hereof.

20.

The execution of the 1959 Agreement, and the actions and agreements of the Defendant Employer and Defendants International and Local with relation to the seniority rights of the Plaintiffs, the Forge Employees, were invalid, improper, void and illegal, for the reasons and averments hereinafter set forth, and resulted in the loss of all of the seniority rights of the Plaintiffs which they had accumulated prior to May 1, 1959, to their great and irreparable loss, for which they have no adequate remedy at law.

21.

Notwithstanding that the Defendant Employer, on and prior to June 1, 1957, i.e., the beginning date of the 1957 Agreement, desired and planned to have the seniority roster of each Division of the said bargaining unit existing under the 1957 and prior agreements combined into one (1) seniority roster for all of the employees of the said bargaining unit, irrespective of in which Division or plant they were employed; yet, it is so that no information or notice of this matter was conveyed to the duly authorized officers, representatives or members of the said bargaining unit until in early August, 1957, when, C. E. Hilliard, Personnel Director of the Defendant Employer, conveyed this information to the shop-bargaining committeemen, who were the representatives of the said unit, and requested that the members of the Defendant Local agree to a combined seniority list for the entire unit, notwithstanding that such a combined seniority list was

contrary to the terms of the 1957 Agreement relating thereto, as above set forth.

22.

Without affording the Defendant Local with a reasonable opportunity for its members to consider the said request and without waiting for any appropriate formal action on the part of the Defendant Local to modify the seniority provisions of the 1957 Agreement, the Defendant Employer, in August, 1957, began the moving of certain machinery and work which, for many years prior thereto, had been located and performed in the Forge Division to the Perry Forge Shop and the Iron Works Shop; and in connection therewith, began the hiring of new employees to perform the said work on the said machinery, which new employees were recognized by the Defendant Employer and designated by the Defendant Wiles as "Iron Works Employees," without any formal action on the part of the Defendant International or the Defendant Local, its duly authorized officers and members, all of which was contrary to the provisions of the 1957 Agreement.

23.

The said Perry Forge Shop was another plant of the Defendant Employer located in the City of Titusville, Pennsylvania, which had been recently acquired and which had been occasionally used for work customarily performed by the Forge Employees in the Forge Shop and for which there had never been any determination by the Defendant Employer and the Defendant Local as to which Division employees were to be employed therein, the said

Shop being referred to under Article XII, Section 3, of the 1957 Agreement as "the future addition now known as Perry Forge Dept."

24.

After the request of the Defendant Employer for a combined seniority list was made to the representatives of the bargaining unit, as aforesaid, the said request received a favorable majority vote of the said committeemen, representing the Iron Works Division and the Forge Division; and it was agreed that the matter would be formally presented for the approval of the membership of the Defendant Local at the next regular meeting.

25.

Despite the action of the said committeemen, the Defendant Wiles, who was Chairman and also then Financial-Corresponding Secretary of the Defendant Local, and who was in charge of it during the many absences from the city in the latter four (4) months of 1957 of the Defendant Graham, who was then President, engaged in a consistent course of conduct, as a principal officer of the said Local, which was unfair, malicious, prejudicial, and arbitrary, which conduct included his regularly, repeatedly, and without due and proper cause, inciting the Iron Works Employees against the Forge Employees, particularly the New Iron Works Employees, by declaring to them that their jobs would be taken from them by the Forge Employees on any consolidation, and falsely representing to them that the Forge Employees were not members of the Defendant Local, but were members of the C.I.O. union, the members of which were

also employed by the Defendant Employer in another bargaining unit in its Titusville plants.

26.

The aforementioned conduct of the Defendant Wiles was motivated by a desire to protect and promote his own personal interests, and those of the other Iron Works Employees of whom he was a members by arbitrarily opposing any consolidation of the seniority lists, his object being to prevent any of the Forge Employees from having any seniority rights over any members of the Iron Works Employees—all of which was contrary to his duties as a principal officer of the Defendant Local, to fairly, impartially, and properly represent all of the members of the Local, including the minority group, the Forge Employees.

27.

At the regular November, 1957, meeting of the Defendant Local, the approval of a plan of combining the seniority rosters of the two Divisions, which recognized the seniority rights of all of the employees in the unit, was adopted by a proper standing vote of the members of the Defendant Local; notwithstanding this fact, later at the same meeting, certain Iron Works Employees hired during and after August, 1957, prevailed upon the Defendant Graham—who was presiding—to improperly permit a second vote on the same question, whereupon the earlier adopted seniority plan was defeated by one (1) vote.

28.

The second vote on the said seniority question was invalid and improper because there was no proper basis

for it; and it was contrary to the *Roberts Rules of Order*, which governs all of the business meetings of the Defendant Local under the provisions of the International and Local Constitution and Bylaws.

Further, the said Defendant Wiles, in abuse of his position as Financial-Corresponding Secretary, permitted certain individuals to vote who were newly employed at the Iron Works Shop and the Perry Forge Shop, but who were *not* members of the Defendant Local because their applications for membership had not been fully processed in accordance with Article VI of the International Subordinate Lodge Constitution, entitled "Qualifications for Membership," and, in addition, certain newly employed Iron Works Employees physically compelled some of the Iron Works Employees, who had refrained from voting on the first vote, to vote against the plan.

Finally, the said second vote was invalid and improper because it was conducted in the absence of certain members who had voted on the first vote.

29.

In a further attempt to comply with the Defendant Employer's request for combining of the seniority rosters of the said Divisions, the Defendant Local, at its regular December, 1957, meeting, submitted to its members a proposal for the straight consolidation of the seniority lists of the Iron Works Division and of the Forge Division, which plan was defeated as a result of a continuation of the improper conduct of the Defendant Wiles described in paragraph 25 and in the preceeding paragraph, all of which was to the great detriment of the Forge Employees.

who were now outnumbered by the "new members" of the Iron Works Division who had been hired since August, 1957.

30.

After the abovementioned December, 1957, meeting, that is, on December 9, 1957, the Forge Employees, orally and in writing, presented a request to the Defendant Graham—as President of the Defendant Local, and as District Representative of the Defendant International—for the removal of the Defendant Wiles from his office of Financial-Corresponding Secretary of the Defendant Local on the grounds of his consistent unfair, malicious, prejudicial and arbitrary activities against the Plaintiff Forge Employees, who were a minority group of the said Defendant Local.

31.

Notwithstanding this request of the Forge Employees, which was properly made, under Section 16 of the Local Bylaws and under Sections 1, 11 and 13 of Article XIII of the International Subordinate Lodge Constitution, to the Defendant Graham in his official capacities, the Defendant Graham refused to permit them to process the said complaint, contrary to their rights under the said provisions. A copy of the said provisions are set forth in Exhibit F, which is attached hereto and made a part hereof.

32.

From on or about August 15, 1957, until May, 1958, the Defendant Employer, by its Vice President, James F. Sweeney, and Personnel Director Hilliard, repeatedly

assured the Forge Employees that during the term of the 1957 Agreement there would be continuous employment for them at the Forge Division plant, and, further, represented to the Forge Employees, who had the greater seniorities, that there would continue to be employment for them at the Forge Division plant for an indefinite future period, irrespective of any action by the Defendant Local relating to the consolidation of the seniority lists, and by reason of their reasonable reliance on the said representations, the said Forge Employees did not fully participate in the business meetings of the Defendant Local relating thereto, including the abovementioned November and December meetings.

33.

During the same period that the said representations were being made by the Defendant Employer to the Forge Employees, it was steadily engaged in removing machinery, operations and work orders from the Forge Shop to the Iron Works and Perry Forge Shops, to perform which work it was employing new employees, while furloughing Forge Employees with greater seniorities, although the said Forge Employees were ready, willing and able to perform the said work which they had customarily performed, irrespective of the location at which the Defendant Employer desired it to be performed, all of which actions of the Defendant Employer were in direct violation of the seniority provisions of the 1957 Agreement.

34.

Commencing in August, 1957, and continuing at periodic intervals thereafter every several weeks through

April, 1958, the Defendant Employer, through Personnel Director Hilliard, repeatedly requested and urged the Defendant Local to agree upon a combined seniority list, notwithstanding the provisions contained in the 1957 Agreement relating to the separate seniority lists.

35.

From on or about August 15, 1957, and periodically thereafter, every several weeks until early May, 1958, the Defendant Employer, through its Personnel Director Hilliard, improperly requested the Forge Employees, through their shop committeemen, to work out of classification, contrary to the provisions of the existing 1957 Agreement, and to conform to the improper practice of the Iron Works Employees who were complying with such requests.

36.

The Defendant Graham and the Defendant Wiles, in furtherance of their plans to discriminate against the Forge Employees unknown to the Forge Employees—ordered, instructed, and permitted various Iron Works Employees to work out of classification, contrary to the provisions of the 1957 Agreement, in accordance with the request and urging of the Defendant Employer; while, at the same time, the Defendant Graham instructed the Forge Employees to work only in classification, with which they complied, as a result of which the Defendant Employer in April, 1958, transferred considerably more of the equipment and a large quantity of the unfinished work then in process in the Forge Division to the Iron Works Division, although the Forge Employees were ready, willing and able to use the said equipment and to

perform the said work at any location desired by the Defendant Employer, which action of the Defendant Employer was in further and continuing violation of the seniority provisions of the 1957 Agreement.

37.

Upon the Plaintiff Forge Employees learning of the improper practice of the Defendant Employer and the Defendant Iron Works Employees set forth in the foregoing paragraph—and that this practice was with the full knowledge, approval and consent of the Defendants Graham and Wiles—on May 12, 1958, the Plaintiff Forge Employees, through the Plaintiff, John C. Martin, Chairman of the Grievance Committee of the Forge Employees*, for and on their behalf and in accordance with their request, filed a written grievance with Personnel Director Hiliiagi of the Defendant Employer, in accord with the pertinent provisions of Step 2 of Article V of the 1957 Agreement, which grievance Personnel Director refused to accept and process by reason of the fact that he had received instructions from the Defendant Wiles, as Chairman of the Grievance Committee of the bargaining unit, not to accept and process any such grievance.

38.

Thereafter, the Forge Employees duly requested the Defendant Graham in his official capacities to require the processing of their grievance by the Defendant Employer and the Defendant Wiles in accordance with the aforementioned provisions of the 1957 Agreement relating to the processing of grievances, but the Defendant Graham

* Forge Works Division Committee

would not accede to their request and would not permit their grievance to be further processed.

39.

By reason of the said actions of the Defendant Employer through its Personnel Director Hilliard and the said arbitrary, unreasonable, discriminatory and improper actions of the Defendants Graham and Wiles, it was impossible for the Plaintiff Forge Employees to further process their grievance in accordance with the pertinent provisions of the 1957 Agreement; and, in any event, further action on their part was useless and futile in view of the attitude and actions of the Defendants Graham and Wiles, as above set forth, and in view of the fact that the Grievance Committee of the bargaining unit, through which any further action was required to be processed, then consisted of three (3) employees, with the Defendant Wiles as Chairman, another Iron Works Employee as another member, the third member being a Forge Employee; and the Defendant Graham, as District Representative of the International, could also participate if requested by the Grievance Committee. The provisions of the 1957 Agreement relating to grievance procedure, set forth in Article V thereof, are set forth in Exhibit G, which is attached hereto and made a part hereof.

40.

By reason of all of the facts set forth in the foregoing averments, in May, 1958, the Forge Employees requested the Defendant Graham—as President of the Defendant Local and as District Representative of the Defendant International—to permit them to file a written grievance

through the Local to the International President for a ruling relating to their seniority rights in view of the continued demand of the Defendant Employer for consolidation and the Defendant Employer's activities above referred to, and for a proper determination thereof in accordance with the policies, principles, Constitution and Bylaws of the Defendants International and Local.

41.

Notwithstanding that the said request of the Plaintiffs was made for proper cause and that irreparable damage was threatened to each of the Plaintiffs because of the matters aforesaid, the Defendant Graham refused to grant permission to them to file their grievance, informing the Plaintiffs that such a complaint would have to be processed through the Defendants Graham and Wiles in their respective official capacities, and that he (Graham) would not permit any such complaint to be filed because it would unfavorably reflect upon him as President of the Local and as District Representative of the International.

42.

After the Defendant Graham refused permission to the Plaintiffs to file their grievance officially through the Defendant Local, thereafter at the same meeting, the Plaintiffs requested permission of the Defendant Graham in his said official positions to permit them to file such a grievance in their personal, individual capacities as members of the International and Local; and the Defendant Graham again refused permission to the Plaintiffs, and in addition, informed the Plaintiffs that if such a complaint were filed by them without his sanction, that

it would be processed through Allegheny section International Vice President, J. V. Kearney, who had jurisdiction of the Defendant Local and that the grievance, in accordance with customary procedures, would be referred to the Defendant Graham and that upon its receipt, he would not give any consideration to it.

43.

Despite the refusal of the Defendant Graham as aforesaid, the Forge Employees in May, 1958, addressed a personal grievance petition to William A. Calvin, President of the Defendant International, in which they set forth all of the facts hereinbefore stated and requested that there be a fair and impartial determination of the issue relating to their seniority rights in view of the activities of the Defendant Employer and of the Defendants Wiles and Graham and the Defendant Iron Works Employees, as hereinbefore mentioned, and the proposed combining of the seniority lists.

44.

Thereafter, on June 7, 1958, at a special meeting of the Defendant Local, the Defendant Graham bitterly reprimanded the Forge Employees for having filed the personal grievance petition with the International President. In addition, the Defendant Graham, as presiding officer, refused the Plaintiff Martin and other members of the Forge Employees present, the right to verbally explain their action in having forwarded their petition to the International President, making unwarranted personal attacks on various members of the Forge Employees who had signed the petition, and requested, urged and obtained

a favorable vote from the Iron Works Employees present, who greatly outnumbered the Forge Employees present, to give no further consideration to the seniority rights and complaints of the Forge Employees in any respect.

45.

After the grievance petition of the Forge Employees was received by the International President, William A. Calvin, it was forwarded by him to J. V. Kearney, International Vice President in charge of the Alleghony section, for investigation and processing.

46.

On June 9, 1958, the said Vice President conducted a hearing with relation to the said grievance petition at Titusville by meeting during much of the day with the Defendants Graham and Wiles and the seven (7) committeemen of the Iron Works Employees to which meeting none of the Forge Employees' committeemen were invited or had any notice thereof, no attempt being made to notify any of the said Forge Employees' committeemen until late in the day, as a result of which only two (2) received notice in time to appear.

47.

Upon the two (2) Forge Employees' committeemen appearing at the said hearing, they were not permitted to give any explanation or to relate any of the facts of the grievance petition forwarded by the Forge Employees to the International President, by reason of the constant interruptions by the Defendant Graham, who used violent, obscene and vituperative language toward the Forge Employees generally, and the said committeemen specific-

ally, in denouncing them for having forwarded the said grievance petition to the International President in the face of his refusals above-mentioned; and in addition, the Defendant Graham stated that he would institute expulsion proceedings against certain of the Forge Employees who had participated in forwarding the said grievance petition.

48.

No further proceedings were held with relation to the said grievance petition, nor was there any disposition made thereof to the knowledge of any of the Forge Employees.

49.

During the regular June, 1958, meeting of the Local, the Defendants Graham and Wiles informed the Plaintiff Martin that they were preferring expulsion charges against him on the ground that, while an officer, Treasurer of the Local, he had affixed his signature along with other Forge Employees to the said grievance petition.

50.

In September, 1958, as a result of the continued activity of the Defendant Employer in transfering machinery and work from the Forge Division Shop to the Iron Works Division Shop and the Perry Forge Shop and in the hiring of new employees to work in the said Shops and the furloughing of the Forge Employees, as aforesaid, the number of Iron Works Employees who were employed had been increased to approximately two hundred fifteen (215), while the number of the Forge Employees who were employed had been reduced to approximately thirty-two (32).

51.

During the week of September 8, 1958, various grievances filed by the Iron Works Employees that they had been requested to work out of classification by the Defendant Employer were duly processed in accordance with the provisions of the 1957 Agreement. On or about January 10, 1959, the hearing arbitrator dismissed all of the said grievances on the ground that, notwithstanding the provisions of the 1957 Agreement relating to working in classification, the Employer had proved an established practice on the part of the Iron Works Employees of disregarding the said provisions and working out of classification when requested by the Defendant Employer.

52.

On or about January 19, 1959, the Defendant Employer, through its Personnel Director Hilliard, presented to the Defendant Local, through its then officers, in writing, a proposal to establish a new general combined seniority list, which proposal was as follows:

> "The Company proposes that all Forge Weldment Employees coming in the scope of the Agreement signed June 19, 1957, whether actively employed or on layoff, who still retain Seniority rights with the Company, shall be added to the bottom of the Iron Works Seniority list, Maintaining their respective Forge Weldment Seniority position.
>
> "The revised Seniority list shall then be known as the Seniority list for both Divisions coming under the current Agreement.

"All Weelment employees placed on the Iron Works Seniority list shall retain full credit for length of service for vacation recall rights and all other benefits."

53.

The said proposal of the Defendant Employer was presented for consideration at the regular January, 1959, meeting of the Local, by its newly elected President, Gerald A. Sager, who ruled that only the Forge Employees were entitled to vote on it, with the result that it was overwhelmingly rejected.

54.

When the said rejection was brought to the attention of its Personnel Director Hilliard, he acting on behalf of the Defendant Employer, insisted that the matter be resubmitted for another vote by the membership of the Local, in order that he could arrange to have sufficient votes cast in favor of it to assure its adoption.

55.

As a result of all of the aforesaid improper, unfair and discriminatory actions of the Defendant Employer and the Defendants Wiles and Graham and the Defendant Iron Works Employees, a representative group of the Forge Employees, two (2) of whom were the Plaintiffs, John C. Martin and Melvin D. Patterson, on February 18, 1959, filed, under oath, unfair labor practice charges against the Defendant Employer and the Defendant Local with the National Labor Relations Board District Office at Pittsburgh, Pennsylvania, which has territorial jurisdiction over such complaints.

56.

Thereafter, although the said representative group, personally and on behalf of the Forge Employees, attempted to duly process the said charges, they were finally advised and informed by a duly constituted representative of the National Labor Relations Board at the Pittsburgh District Office that under the National Labor Relations Act, the matters complained of were not within its jurisdiction; that no relief could be granted to them and recommended that the said complaints be withdrawn, with which recommendation the Forge Employees complainants complied.

57.

Shortly after the filing of the charges with the National Labor Relations Board, as above mentioned, the Defendant Graham, as District Representative of the International, and Gerald A. Sager, the then newly elected President of the Local—without the filing of any charges, or the holding of any hearing or trial—summarily removed the Plaintiffs Martin and Patterson and two (2) other Forge Employees from their various offices in the Local, because they had signed the above mentioned N.L.R.B. charges, which action of the Defendant Graham and the said Gerald A. Sager, was illegal, improper, arbitrary and contrary to the provisions of the International Subordinate Lodge Constitution.

58.

In addition, the Defendant Graham and the said Gerald A. Sager filed charges for expulsion from the union against the abovementioned members of the Forge Employees, because they had filed the said charges before

the National Labor Relations Board, although the said expulsion charges were later dismissed upon the directions of the International Headquarters, by reason of the illegality of such action of the Defendant Graham and of the said Gerald A. Sager.

59.

As of April 1, 1959, there were no operations being carried on by the Defendant Employer at the Forge Shop, and all Forge Employees had been furloughed by the Employer; at the same time, the machines and orders on which the Forge Employees customarily worked were being serviced at the Iron Works Shop and the Perry Forge Shop by Iron Works Employees, most of whom were still employed, and many of whom had much less seniority than the Forge Employees, particularly those Iron Works Employees who had been employed since August of 1957, as above-mentioned.

60.

In early April, 1959, the Defendant Employer and the Defendant Local began negotiating a new collective bargaining agreement to become effective after May 31, 1959, during which negotiations, the Defendant Employer's representatives informed the representatives of the Defendant Local that unless they first disposed of the "seniority issue" in accordance with the Employer's proposal of January 19, 1959, above set forth, it would refuse to further negotiate and would bring to a close all of its operations at Titusville.

61.

By reason of the said demand made by the Defendant Employer, a special meeting of the Defendant Local was

held on May 2, 1959, at which—at the special urging of the Defendants Graham and Wiles—the Defendant Local, including the Iron Works Employees who had been newly employed since August, 1957, and who outnumbered the Forge Employees, approved the Employer's proposal, adopting a consolidation plan, under which, from May 1, 1959, the bargaining unit would have a general seniority list, to be known as the Iron Works Seniority List, in which the seniority of all Forge Employees would begin as of May 1, 1959, regardless of length of service in the unit, and contrary to the terms of the existing 1957 Agreement, which did not terminate until May 31, 1959.

62.

Following the said action by the Defendant Local, on or about May 18, 1959, the Forge Employees appealed in writing to Russell K. Berg, International Vice President, at International Headquarters, who was then acting on behalf of the International President, William A. Calvin, in his absence, for an investigation into the activities of the Defendant Local and the Defendant Employer, hereinbefore averred, culminating in Defendant Local's action of May 2, 1959, and particularly as they affected the Plaintiffs' seniority and related rights.

63.

The said appeal was formally made to the said International Vice President Berg, in accordance with previous directions given by him to Melvin D. Patterson, one (1) of the Plaintiffs herein, after he had personally reported at International Headquarters at Kansas City, Kansas, on behalf of the Forge Employees, all of the hereinbefore stated facts. The said formal appeal in-

cluded a series of affidavits, executed by the various Forge Employees, verifying all of the facts hereinbefore averred by the Plaintiffs.

64.

Acting on the aforementioned written appeal, International Vice President Berg specially assigned International Vice President Precht of Denver, Colorado, to make an investigation of all of the activities of the Defendant Employer, the Defendant Local, and the Defendants Graham and Wiles hereinbefore averred by the Plaintiffs.

65.

On or about July 15, 1959, International Vice President Precht, after having made his investigation, called and conducted a special meeting of the Defendant Local in Titusville and informed the membership that his investigation revealed that the union leadership during the period following the execution of the 1957 Agreement had been very deficient; that the actions of the Defendant Local, its officers and the Iron Works Employees with relation to the seniority rights of the Forge Employees, including the Defendant Local's action of May 2, 1959, relating to the same, were illegal, improper and contrary to established union policy; and that the Forge Employees were entitled to have their seniority rights restored, or, at least, to receive their severance pay if the Forge Shop had been closed permanently.

66.

In addition, International Vice President Precht informed the membership of the Defendant Local that he

would recommend to the International President that the action of May 2, 1959, of the Local with relation to seniority, be overruled and rescinded; that all of the seniority rights of the Forge Employees be restored; that the Local be ordered to combine the seniority rosters of the two Divisions straight across, with no loss of seniority to any members involved; and further, that by August 15, 1959, the final decision on this matter would be forwarded to the Forge Employees and the Local.

67.

Notwithstanding the aforementioned representation of the International Vice President, no further report has ever been received by the Forge Employees, or anyone on their behalf.

68.

In the fall of 1959, the Plaintiffs ascertained that the Defendants International and Local had executed the 1959 Agreement, to be effective for the period from June 1, 1959, through July 31, 1960, in which the plan of seniority adopted by the Defendant Local on May 2, 1959, and the subject of the Forge Employees' complaint to the International, as above mentioned, was formally put into effect.

69.

The Plaintiffs aver that they have exhausted all and every remedy and procedure available to them under the International Lodge Constitution and the Subordinate Lodge Constitution and Bylaws of the Defendants International and Local—all to no avail—notwithstanding the abovementioned great and grievous wrongs to them and the illegal denial of their rights which have continued

during the entire period from May 1, 1959, in support of which, the Plaintiffs aver as follows:

(a) The International Subordinate Lodge governing the Local and the Bylaws adopted by the Local thereunder contained no specific provisions for the processing of the matters hereinbefore complained of by the Plaintiffs, although, as above averred, the Plaintiffs attempted in every reasonable manner to have their complaints properly considered and processed by the Local, but were not permitted to process the same by the arbitrary and improper action of the Defendant Graham, acting both as President of the Local and as International Representative.

(b) The International Lodge Constitution sets forth no specific procedures for the processing of the matters complained of by the Plaintiffs, as hereinbefore averred, the International Constitution providing only generally for a Committee on Appeals and Grievances which is to report to the International meeting in convention every four (4) years; and providing further that when the International is not in convention session, the Executive Council of the International, which is composed of the President and the sixteen (16) International Vice Presidents, is to have full power to consider and determine all appeals and grievances referred to it by any subordinate or district lodge, or by any subordinate or international officer. References to the pertinent sections of the International Lodge Constitution are set forth in Exhibit H, which is attached hereto and made a part hereof.

(c) The Plaintiffs further aver that because the improper and arbitrary actions of the Defendants Wiles and Graham, as above set forth, made it impossible for them to proceed through the Subordinate Lodge, they proceeded through personal appeal to the President, who is the chief executive officer in charge of all brotherhood matters, and who assigned the said matter for investigation to the International Vice President Precht, as above set forth.

(d) Although more than a reasonable time has elapsed within which to finally determine the said matter, particularly in view of the subject of the appeal and the immediate and continuing losses which were threatened to the Plaintiffs, and which the Plaintiffs have sustained during the entire period from May 1, 1959, yet, no formal disposition has been made thereof within the knowledge of any of the Plaintiffs, other than they have learned of the execution of the 1959 Agreement, incorporating the complained of seniority provision.

(e) The Plaintiffs further aver that they have no knowledge, and have been unable to ascertain, whether or not the Executive Council of the International has had any meeting since July 15, 1959, the date of the meeting of the Local called by International Vice President Berg, as above mentioned, and when the International will have its next convention following the convention held by it in May, 1957.

(f) The Plaintiffs further aver that in view of all of the foregoing, they have exhausted every practical procedure open to them as members of the

Defendants Local and International with reference to their complaints and grievances hereinbefore averred.

70.

The Plaintiffs further aver, upon information which they believe to be true, that the Defendant Employer and the Defendants Local and International have agreed to, and executed, a subsequent agreement, effective August 1, 1960, following the termination date of the 1959 Agreement on July 31, 1960, for a period which is unknown to the Plaintiffs, but which is in the knowledge of the Defendants, in which there is again incorporated the seniority provisions set forth above of the 1959 Agreement.

71.

The Plaintiffs further aver that from about April 1, 1959, all of the Forge Employees have been laid off, and continued to be laid off, by the Employer for a period of approximately fourteen (14) months, the work force at the Forge Division having been gradually reduced from August, 1957, to that date, when all operations at the Forge Shop had ceased; and that most of the Forge Employees laid off for the said fourteen (14) month period would have been employed during the entire period, and many of the Forge Employees would have been employed for a large portion of the said period, excepting for the complained of actions of the Defendants above-mentioned, including the application of the seniority provisions of the 1959 Agreement.

72.

The unlawful and improper actions of the Defendants Employer, International, Local and Graham, as above set forth, have caused and are causing great irreparable loss to the Plaintiffs and have been and are depriving them of their seniority status with:

(a) Loss of wages for work which they were entitled to perform, but which they were unable to perform because of their being improperly and illegally laid off, with members of the Iron Works Employees—having much less years of service—being permitted to work in their stead;

(b) Loss of vacation pay, to which they would otherwise be entitled, except for their having been improperly laid off, as above set forth;

(c) Loss of their rights on reinstatement and advancement;

(d) Loss of their accumulated severance pay rights.

73.

The Plaintiffs also aver, in the alternative, that the actions of the Defendant Employer, in transferring the work and machinery from the Forge Division Shop, culminating in termination of its operations there, on or about April 1, 1959, with the laying off of all of the Forge Employees who would otherwise have been employed there, constituted a permanent discontinuance of the department within the terms of Section 1 of Article XVIII of the 1957 Agreement, set forth in Exhibit D

hereof, the Plaintiffs averring in the alternative that they are, therefore, at least, entitled to severance pay provided for under Article XVIII of the [illegible] agreement, which was then in effect; and that no such payments have ever been made to any of them.

74.

The Plaintiffs aver that in connection with the great irreparable loss that they have suffered, and will continue to suffer as above averred, that they have suffered great financial loss, the exact amount of which cannot be determined until the legal issues arising in this action, including the right of the Plaintiffs to any severance pay, have been finally determined, and for which loss they aver they are entitled to be compensated for the full amount thereof, together with interest at a legal rate for the delay in payment thereof.

75.

The Plaintiffs aver that they have no adequate remedy at law, and that if they do not obtain the relief hereinbefore requested, they will continue to suffer great irreparable loss, and to be deprived of their seniority status, including the loss of employment and loss of rights on lay-off, reinstatement, advancement, vacation pay, and severance pay.

76.

The aforementioned acts of the Defendants International and Local, resulting in the loss of the Plaintiffs' seniority status, as above set forth, were improper and wrongful in the following respects:

(a) The plan for the consolidation of the seniority lists, adopted by the said Defendants and incorporated in the 1959 Agreement, was not fair and reasonable under all of the circumstances.

(b) The plan for the consolidation of the seniority lists, adopted by the said Defendants and incorporated in the 1959 Agreement, was arbitrary and discriminatory in that, without any proper cause or justification, and without any reasonable basis, the Forge Employees were caused to lose all of their seniority status to the advantage of the Iron Works Employees, many of whom had accumulated much less seniority.

(c) The Defendants Local and International breached their duty to fairly represent all members of the bargaining unit for which they were the exclusive statutory bargaining agent, including the minority group, the Forge Employees, the Plaintiffs herein.

(d) The Defendants Local and International breached their fiduciary duty owed to all members of the unit on whose behalf they were bargaining agent, and specifically the Plaintiffs, to fairly, honestly, impartially, and with proper fidelity, negotiate and otherwise act, on their behalf.

(e) The actions of the Defendant Local, approved by the Defendant International, were directed and executed by the Defendants Graham and Wiles, the duly designated executive officers of the Defendant Local, who, because of their open hostility,

personal animosity and selfish motivation, as hereinbefore averred, treated the seniority and other rights of the Forge Employees—a minority group of the bargaining unit—with bad faith, fraud and discrimination, in a deliberate attempt to deprive them of all their rights as members of the bargaining unit.

(f) The Defendant Local acted in concert with the Defendant Employer, by engaging in the activities hereinbefore averred, to serve the interests and objectives of the Employer, to the detriment of the Plaintiff Forge Employees, in disregard of all of the duties owed to them as members of the bargaining unit, for which it was bargaining agent, the said actions of the Defendant Local being ratified by the Defendant International.

77.

The aforementioned acts of the Defendant Employer, concurrent with the acts of the Defendants International and Local, resulting in the loss of the Plaintiffs' seniority status, as above set forth, were improper and wrongful in the following respects:

(a) The Defendant Employer proposed, urged and then demanded the plan for the consolidation of the seniority lists, adopted by the Defendants Local and International and incorporated in the 1959 Agreement, which plan was not fair and reasonable under all of the circumstances.

(b) The Defendant Employer proposed, urged and then demanded the plan for the consolidation of the seniority lists, adopted by the Defendants Local

and International and incorporated in the 1959 Agreement, which plan was arbitrary and discriminatory in that, without any proper cause or justification, and without any reasonable basis, the Forge Employees were caused to lose all of their seniority status to the advantage of the Iron Works Employees, many of whom had accumulated much less seniority.

(c) The Defendant Employer, by its gradual removal of the work and machinery from the Forge Shop to the Iron Works and Perry Forge Shops, and the hiring of new men to do the said work, while laying off the Forge Employees as above mentioned, committed continuing and flagrant breaches of the seniority provisions of the 1957 Agreement.

(d) The just mentioned activities of the Defendant Employer, together with its requests, urging, and then demands for a combined seniority list, were either calculated to, or were likely to, and did, create dissension and strife within the two Divisions of the bargaining unit, engendering hostility and personal animosity which made impossible a fair, honest and impartial determination of the seniority rights issue.

(e) The just mentioned activities of the Defendant Employer, together with its requests, urging, and then demands for a combined seniority list, and representations made to the various Forge Employees in connection therewith, as above mentioned, were either calculated to, or were likely to, and did, cause a gradual strengthening of the representative strength of the Iron Works Employees, with a correlative weakening of the representative strength of the

Forge Employees, which made it impossible for proper, fair and honest consideration to be given to the seniority rights of the Forge Employees.

(f) All of the abovementioned activities of the Defendant Employer were calculated by it to serve the interests and objectives of the Defendant Employer of depriving the Forge Employees of all their rights as members of the bargaining unit.

(g) The Defendant Employer influenced, encouraged and acted in concert with the Defendant Local in its breaches of the duties owed by it to all of the members of the unit as bargaining agent, as above set forth.

(h) The Defendant Employer improperly interfered with the seniority status of the Forge Employees.

78.

The aforementioned acts of the Defendant Graham as President of the Defendant Local, and District Representative of the Defendant International, concurrent with the acts of the Defendant Employer, resulting in the loss of the Plaintiffs' seniority status, as above set forth, were improper and wrongful in the following respects:

(a) The Defendant Graham deliberately refused to perform his duties in the said offices by refusing to process the complaints of the Forge Employees and according them due process with relation thereto, and in the other instances hereinbefore mentioned.

(b) The Defendant Graham improperly and illegally performed the duties of the said offices, in

performing the said duties with hostility, personal animosity, and selfish motivation, as heremebefore averred, and in treating the seniority and other rights of the Forge Employees—a minority group of the bargaining unit—with bad faith, fraud and discrimination, in a deliberate attempt to deprive them of all of their rights as members of the bargaining unit.

(c) The Defendant Graham improperly and illegally performed the duties of the said offices by acting in concert with the Defendant Employer, as above set forth, to serve the interests and objectives of the Employer to the detriment of the Plaintiff Forge Employees, in disregard of the duties owed to them by the Local as bargaining agent.

(d) The Defendant Graham improperly and illegally performed the duties of the said offices in exercising the authority of his said offices, and using his position of leadership, to encourage and direct the Local to commit the various wrongful acts set forth in paragraph 76 hereof.

79.

The Plaintiffs aver that this action is brought against the Defendant Iron Works Employees, as a class, in order that the seniority rights status of the Forge Employees, as against them, may be properly and legally adjudicated; and as to all of the other Defendants, this action is brought against them, jointly and severally, for all relief to which the Plaintiffs are entitled, including such damages and other recoveries as may be legally determined.

By reason of all of the foregoing, the Plaintiffs request the Court:

A. To order the Defendants to return the Plaintiffs to their rightful positions, classifications, seniorities and related rights in the bargaining unit, including all previous rights belonging to each of the Plaintiffs under the 1957 Agreement, and as the same may have been extended or amended and in effect as of May 1, 1959, and thereafter.

B. To order the Defendants Employer, International, Local and Graham to pay to the Plaintiffs the full compensation for the loss of wages and vacation pay which they are entitled to receive, by reason of loss of work from their being improperly and illegally laid off and otherwise being denied of their seniority rights, and or such severance pay as may be determined is due and payable to the Plaintiffs, or any of them, together with six (6%) per cent interest thereon.

C. To award to the Plaintiffs all costs and reasonable attorney fees for the prosecution of this action.

D. To award to the Plaintiffs such punitive damages as the Court may deem proper for the grossly wanton disregard of their legal rights by the Defendants Employer, International, Local and Graham.

E. To enter an appropriate decree so that the Defendants Employer, International, Local and Graham will be restrained, prohibited, and inhibited from invoking any retaliatory action against any of the

Plaintiffs by reason of their having instituted this legal action.

F. To enter an appropriate decree so that the Defendants Employer, International, Local and Graham will be restrained, prohibited and inhibited from doing any act or thing in derrogation of the seniority and other related rights of the Plaintiffs as members of the bargaining unit, and as members of the Defendants International and Local.

G. To retain jurisdiction of this action to make certain that the decree of the Court is obeyed.

H. To grant such other and further relief to the Plaintiffs as it deems appropriate.

Barco and Barco
By George J. Barco,
Attorneys for Plaintiffs

(Affidavit)

PLAINTIFFS' EXHIBIT A

FORGE EMPLOYEES PARTICIPATING IN ACTION

Name	*Seniority Date*
BAUER, Charles M.	September 19, 1945
BIENIO, Bogdan	May 21, 1951
BORTZER, Mont R.	April 24, 1951

Complaint
Plaintiffs' Exhibit A

Name	*Seniority Date*
BROWN, Burton W.	April 23, 1951
CHAPPEL, Homer R.	August 27, 1951
COLLINS, Hazen F.	May 7, 1936
COPELAND, Donald C.	April 30, 1956
COSMARK, Francis J.	July 12, 1945
CRAMER, Reed L.	May 5, 1947
DALY, Robert L.	August 20, 1951
DAUM, William E.	1946 or 1947
DUFFY, Richard W.	November 20, 1950
FOLEY, Kenneth A.	December 28, 1948
GILSON, Calvin C.	March 31, 1947
GRAHAM, J. Earl	December 13, 1955
GRANT, Alfred C.	January 9, 1956
GRAY, Donald F.	May 28, 1951
GRAY, G. Louis	June 11, 1956
GUNTRUM, Tracy E.	November 27, 1945
HATCHER, Hayes E.	September 24, 1951
HOLLABAUGH, Burton J.	April 16, 1946
HOLLAND, Francis J.	February 16, 1948
HOMAN, Carl V.	July 23, 1946
HUNT, Alfred W.	February 1, 1951
IRWIN, Luther F.	January 24, 1955
JONES, Frederick A.	September 1, 1955
JORDAN, Logan J.	August 30, 1951
KLINE, Ralph M.	February 6, 1956
KOLACEK, William H.	December 30, 1947
KOLOBITZ, John R.	March 10, 1947
LABOW, Paul	1946
LOONEY, James F.	November 29, 1950
LOWICKI, Henry J.	April 17, 1956
MADDEN, Charles L.	November 22, 1945

Name	*Seniority Date*
MANGEL, John W.	September 10, 1946
MARTIN, John C.	April 1, 1947
MELLON, Emery C.	April 21, 1947
MOORE, Lloyd R.	September 16, 1946
MORONSKI, Anthony	May 25, 1948
MORONSKI, Frank	March 10, 1952
MORONSKI, John	May 14, 1947
MORONSKI, Joseph	November 23, 1953
MORONSKI, Leo	July 27, 1948
MORRIS, Edwin	July 22, 1947
McALEVY, Norman L.	January 23, 1956
McCUNE, William W.	February 9, 1948
McELHANEY, Donald S.	January 22, 1947
McKEE, Ralph	September 1, 1955
NELSON, Playford A.	October 27, 1955
PACHNICK, Henry F.	May 7, 1956
PATTERSON, Melvin D.	December 19, 1955
PEEPLES, Clifton C.	February 6, 1956
PIER, Donald J.	January 23, 1956
PRICE, Francis H.	January 23, 1956
RHOADES, William C.	September 6, 1946
RYBKA, John	December 29, 1947
SHORTS, Frank M.	August 28, 1951
SINES, Clifford W.	July 31, 1951
SLAGTER, Charles J.	July 22, 1946
SLATER, Charles E.	January 8, 1953
SLATER, Francis J.	January 17, 1956
SOMERVILLE, Wesley A.	November 18, 1946
SOPHER, Lawrence M.	November 15, 1945
SQUIRE, Kenneth C.	November 27, 1951
STOKES, Emerson E.	July 11, 1951

Complaint
Plaintiffs' Exhibit B

Name	*Seniority Date*
TENNEY, Robert G.	May 28, 1951
VANDERHOFF, Leon L.	May 16, 1956
WITHERALL, James J.	October 31, 1955
WRIGHT, Owen D.	September 24, 1945
ZAHNER, Richard W.	June 11, 1956

PLANTIFFS' EXHIBIT B

ARTICLES OF AGREEMENT BETWEEN STRUTHERS WELLS CORPORATION AND INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS OF AMERICA AND LOCAL LODGE 636, A.F.L.-C.I.O., EXECUTED JUNE 19, 1957

ARTICLE II

SENIORITY

Section 1. Seniority is defined as follows: (a) Length of continuous service with the Corporation for vacation purposes. (b) Length of continuous service in any and all classifications within the bargaining unit in all departments and shops of the plant, for purposes of lay-off, reinstatement and advancement within the jurisdiction of the Union. Each Division is to maintain a separate seniority roster. An Employee may be transferred by the

Company from one division to another on a temporary basis for a period of not to exceed sixty (60) days without any change in his seniority status. Where an employee is so transferred for a period of over sixty (60) days, such transfer shall be deemed permanent unless an extension of said sixty (60) days shall be agreed to between the Company and the Union. However, in no case is an Employee to be transferred from one Division to another while an Employee is on lay-off from that Division or who holds or has previously held the same classification of the employee to be transferred.

Section 2. New Employees shall be considered as probationary Employees for a period of thirty (30) days from the date of employment but if and when such probationary Employee has been employed thirty (30) days, he shall become a regular Employee and shall be given seniority credit from the date of employment. During the period of thirty (30) days in which he shall have no length of service, as herein provided, the Employer may suspend or discharge him for any lawful reason whatsoever; and no claim will be made by him or the Union or any of its representatives that the suspension or discharge was improper.

Section 3. Should it become necessary to make a lay-off or reduce the force, seniority and qualifications within the unit shall prevail. A lay-off notice of three working days will be given except in any emergency, including breakdown, beyond the control of the Company. The Employee or Employees affected may elect to take a lay-off in the classification held at the time of the lay-off or be

transferred to another classification, providing at that time he holds seniority rights over another Employee in the said classification and had or since attained sufficient skill to perform the duties of the Employee he replaces. In exercising seniority it is definitely understood that the Employee must be qualified to perform the work required. It is agreed that the above does not apply when the lay-off is temporary. "Temporary" is defined as not exceeding two (2) working days. However, in the event of any such temporary lay-off, the employee to be so laid off will be notified thereof by the Company and may, upon such notification, if he desires, elect either to accept the lay-off, or to exercise his seniority rights against any employee who has less seniority and is working in a classification held or previously held by such employee. Such election must be made by the employee at the time of such notification and any such election so made shall be binding upon him and not subject to change.

Section 11: Employees who have been laid off will be considered for any job openings in either plant before new Employees are hired.

PLAINTIFFS' EXHIBIT D

ARTICLES OF AGREEMENT BETWEEN STRUTHERS WELLS CORPORATION AND INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS OF AMERICA AND LOCAL LODGE 636, A.F.L.-C.I.O., EXECUTED JUNE 19, 1957

ARTICLE XVIII

SEVERANCE PAY

Section 1. When in the sole judgment of the Corporation, it decides to close permanently a plant or discontinue permanently a department of a plant or a substantial portion thereof and terminate the employment of individuals, an employee whose employment is terminated directly or indirectly as a result thereof because he was not entitled to other employment under the provisions of Article II, Seniority, of this Agreement and Section 2, below, shall be entitled to a severance allowance in accordance with and subject to the following provisions.

Section 2. Such an Employee to be eligible for a severance allowance shall have accumulated three (3) or more years of continuous Company service and computed in accordance with Article II, Seniority, of this Agreement.

Section 3. In lieu of severance allowance, the Corporation may offer an eligible employee a job, in any job

classification for which he is qualified, in other shops or departments of the plants. The Employee shall have the option of either accepting such new employment or requesting his severance allowance.

Section 4. As an exception to Section 3, of this Article, an Employee otherwise eligible for severance pay who is entitled under Article 11, Seniority, to a job in the same job classification in another part of the plant shall not be entitled to severance pay whether he accepts or rejects the transfer. If such transfer results directly in the permanent displacement of some other employee, the latter shall be eligible for severance pay provided he otherwise qualifies under the terms of this Article.

Section 5. An eligible individual shall receive severance allowance based upon the following weeks for the corresponding continuous service:

Continuous Company Service	*Weeks of Severance Allowance*
3 years, but less than 5 years	4
5 years, but less than 7 years	6
7 years, but less than 10 years	7
10 years, or more	8

Allowance: A week's severance allowance shall be forty (40) hours straight time pay at the rate the Employee is receiving at the time of termination. Payment shall be made in a lump sum at the time of termination.

Section 6. Severance allowance shall not be duplicated for the same severance, whether the other obligation

arises by reason of contract, law or otherwise. If an individual is or shall become entitled to any discharge liquidation, severance or dismissal allowance or payment of similar kind by reason of any law of the United States of America or of the State of Pennsylvania, the total amount of such payments shall be deducted from the severance allowance to which the individual may be entitled under this Article, or any payment made by the Corporation under this Article may be offset against such payments. Statutory unemployment compensation shall be excluded from the non-duplication provisions of this Section.

PLAINTIFFS' EXHIBIT E

ARTICLES OF AGREEMENT BETWEEN STRUTHERS WELLS CORPORATION AND INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS OF AMERICA AND LOCAL LODGE 636, A.F.L.-C.I.O., EXECUTED UNDER SEPTEMBER 23, 1959

ARTICLE II

SENIORITY

Section 1. Service with the Company shall be defined as follows: (a) Length of continuous unbroken service with the Company for vacation purposes, which, for the purposes of this Agreement, shall hereafter be referred to as "length of service." (b) Length of continuous un-

broken service with the Company within the bargaining unit, in all departments and shops of the plants, for purposes of lay-off, recall, shift preference and advancement within the jurisdiction of the Union, shall, for the purposes of this Agreement, be hereafter referred to as "seniority." (c) Continuous unbroken service, as user in this Section 1, shall be deemed to mean service not interrupted by discharge or other termination.

Section 2. The separate seniority rosters provided for in prior Agreements are hereby eliminated. All employees of the Company whose names appear on the Forge Weldment Division seniority list as of May 1, 1959, shall be placed at the bottom of the present Iron Works Division seniority list, in their respective classifications, retaining, on such combined seniority list, their former positions with respect to each other. The combined seniority list shall henceforth be deemed to be one seniority list and shall be known as the "seniority list."

Such former Forge Weldment employees shall retain all "length of service" for vacation purposes, but their "seniority" shall become effective as of May 1, 1959. In case of reduction of the Company's work force, former Forge Weldment employees who have been added to the new seniority list, as provided for herein, shall be subject to lay-off before former Iron Works Division employees whose names appear on the said new seniority list. Since all former Forge Weldment employees included in the new seniority list have the same "seniority" date, they shall be subject to layoff in accordance with their position with respect to each other, commencing with the employee at the bottom and working upward.

All new employees hired on or after May 1, 1959, shall be placed on the seniority list in their respective classifications, below the above referred to former Forge Weldment employees.

The Company may assign any employee on the seniority list to work as the Company finds him qualified in his job classification in any place at any time without affecting his seniority. However, in case the assignment is to work in a location away from what is generally known as the Iron Works and the employee declines to accept the assignment, he shall not be required to accept such assignment unless he is the most junior-in-seniority qualified employee then working. If he is the most junior-in-seniority qualified employee then working, he shall perform his work as assigned in such case.

Section 3. New Employees shall be considered as probationary employees for a period of thirty (30) days from the date of employment but if and when such probationary Employee has been employed thirty (30) days, he shall become a regular Employee and shall be given seniority credit from the date of employment. During the period of thirty (30) days in which he shall have no length of service, as herein provided, the Employer may suspend or discharge him for any lawful reason whatsoever, and no claim will be made by him or the Union or any of its representatives that the suspension or discharge was improper.

Section 4. Should it become necessary to make a layoff or reduce the work force, seniority and qualifications within the unit shall prevail. A layoff notice of three (3) working days will be given by the Company, except in

any emergency, including breakdown, beyond the control of the Company. If a layoff notice of less than three (3) days is given, the employee shall nevertheless be provided with three (3) days work or paid in lieu thereof. The employee, or employees affected may elect to take the layoff in the classification held at the time of receipt of the layoff notice, or exercise his seniority to bump into another classification, provided, at that time, he holds seniority rights over another employee in said other classification and had sufficient skill to perform the duties of the employee he replaces. In exercising seniority it is definitely understood that the employee must be qualified to perform the work of the man he replaces, and if he proves to be not qualified after having so exercised his seniority rights, he shall be laid off without the three (3) day notice and shall not be recalled until his services are required in his regular classification. It is agreed that the three (3) day layoff notice provided above does not apply when the layoff is "temporary." "Temporary" is defined as not exceeding two (2) working days. However, in the event of such "temporary" layoff, the employee to be affected will be notified thereof by the Company, and may either accept such temporary layoff or exercise his seniority to bump any employee with less seniority and who is working in a classification held or previously held by the employee about to be "temporarily" laid off. Such election must be made by the employee at the time of notification of "temporary" layoff, and shall be binding upon him and not subject to change. It is agreed that the "temporary" and indefinite layoff procedures, provided for in this Section, cannot be invoked simultaneously.

PLAINTIFFS' EXHIBIT G

ARTICLES OF AGREEMENT BETWEEN STRUTHERS WELLS CORPORATION AND INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS OF AMERICA AND LOCAL LODGE 636, A.F.L.-C.I.O., EXECUTED JUNE 19, 1957

ARTICLE V

GRIEVANCE PROCEDURE

Section 1. Should any dispute or difference arise between the Employees or the Union and the Employer as to the intent, application or operation of any provision of this Agreement, such dispute or difference shall be settled forthwith in the following manner:

Step 1. Between the aggrieved Employee, Committeeman, Foreman of the Department involved and the Shop Superintendent.

Step 2. Between members of the Division Committee and the Personnel Director. Starting with this Step grievances are to be in writing and replied to in writing.

Step 3. Between the Grievance Committee and the Personnel Director. The Grievance Committee to have International Representative when desired.

Step 4. In the event the dispute or difference cannot be settled satisfactorily, request may be made

by either party for the services of the Pennsylvania State Mediation Service.

Step 5. In the event the matter is not satisfactorily settled through Step 4, then either party may request the Federal Mediation service for the appointment of an Arbitrator.

Section 2. The Arbitrator shall have the jurisdiction and authority to interpret, apply or determine compliance with the provisions set forth in the Agreement; however, the Arbitrator shall not have the jurisdiction to add to, detract from, or alter in any way the provisions of this Agreement.

Section 3. The decision of the Arbitrator shall be final and binding upon both parties to the Agreement.

Section 4. All expenses of the Arbitrator shall be borne equally by the Employer and the Union.

Section 5. Grievances must be submitted by the aggrieved Employee, employees, or Union within a reasonable time following the alleged incident.

Section 6. In the event a satisfactory settlement is not concluded within twenty (20) days between Steps 1 and 4, the matter shall within ten (10) days thereafter be disposed of in accordance with Step 5, Section 1, or the matter will be deemed closed.

Section 7. There shall be no strikes, work stoppages or slowdowns by the Union, or lockouts by the Employer during the life of this Agreement.

PLAINTIFFS' EXHIBIT H

INTERNATIONAL LODGE CONSTITUTION OF THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS

ARTICLE II

CONVENTION

Section 1. Conventions of this International Brotherhood shall be held every four (4) years, and the first Monday in May of such years shall be the date for the convening of the conventions, unless otherwise changed by referendum vote. . . .

Appointment of Committees and Their Duties

Section 9(a). The International President shall appoint the following Committees, to consist of not less than the following number of members:

Committee on Appeals and Grievances 11

Appeals and Grievances

Section 14. The Committee on Appeals and Grievances shall hear or receive written statements on the same and report thereon to the International Brotherhood Convention.

Complaint
Plaintiff's Exhibit H

ARTICLE III

Executive Council

Section 2. The Executive Council shall be composed of the International President and sixteen (16) International Vice-Presidents and it shall have executive and judicial authority as provided in Article I, Section 4 hereof.

Supervision by and Meetings of Executive Council

Section 4. The Executive Council shall have supervision over the International Brotherhood when not in convention session. Its meetings shall be held annually, unless conditions warrant special meetings. It shall have the power to pass on any subject, proposition, or grievance; and hear and determine all cases of appeal from the decisions and rulings of the District and Subordinate Lodges, or against any officer of the International Brotherhood or appointed representative. All decisions of the Executive Council shall be final.

Adjustment of Grievances

Section 5. The Executive Council, in conformity with the International Lodge Constitution and Subordinate Lodge Constitution, and with the Convention's Declaration of Policy as its guide, shall hear and determine all grievances referred to it by any Subordinate or District Lodge or by any Subordinate or International Officer, and shall recommend remedies or adjust the same as the gravity of the case may require.

Complaint
Plaintiffs' Exhibit II

ARTICLE V

DUTIES OF THE INTERNATIONAL PRESIDENT

Section 5. No individual member, or officer, or District, or Subordinate Lodge shall in any case where asserting a right allegedly growing out of his or its membership in this International Lodge, or any Subordinate Lodge thereof, resort to any civil court or any government agency, until the said member, or officer, or District, or Subordinate Lodge, shall have first exhausted the procedure for hearing, trial and appeal provided by the International Lodge Constitution and or the Subordinate Lodge Constitution. A violation of this Section will subject the individual member, or officer, to a trial and penalty in accordance with Article XIV of the Subordinate Lodge Constitution. A violation of this section by a District or Subordinate Lodge will subject said Lodge to the penalty of having its charter suspended or revoked in accordance with the procedure of Section 4 of Article V of the International Lodge Constitution, and the penalty of being fined in the sum equal to the expense that the party against whom said action was commenced shall be required to incur in defense thereof, and said sum, when collected, shall be paid to said party.

APPENDIX D

PRELIMINARY OJECTIONS

(Filed by Struthers Wells Corporation)

To the Honorable, the Judges of Said Court:

Comes now, Struthers Wells Corporation, one of the defendants in the above captioned case, by its attorneys undersigned and makes these preliminary objections to plaintiff's Complaint in Equity, moves the court for judgment and hereby assigns the following reasons therefor:

JURISDICTION

1. This Court does not have jurisdiction over the subject matter of this action, for the following reasons, among others:

1. Rights of Union Members and adjudication of matters pertaining to rights of individual Union Members in that capacity are determined under Federal and State administrative functions preempting the adjudicatory powers of this Court in such matters.

2. The allegations of the Complaint relate to matters arising under labor agreements between an Employer and a Union certified under and pursuant to Federal Law, and can be adjudicated only pursuant to that Federal law

which provides the National Labor Relations Board as the appropriate forum.

3. Alleged claims under the severance pay provisions of the labor agreements are not cognizable in this Court for the reasons above stated and because plaintiffs have failed to initiate or exhaust the remedies provided in the labor agreements.

4. This Court does not have the power to grant the prayed for relief, for to do so would require this Court to either reinstate a contract which all parties agree expired May 31, 1959, or to write a contract between the Company and the Union in violation of Federal Law respecting negotiation of labor contracts, or to decree that seniority shall no longer be deemed a bargainable issue between the Employer and the Company subject to approval of a majority of the membership of the Union, which decree would be in violation of Federal Law.

5. Plaintiffs have adequate remedies at law.

Wherefore, defendant, Struthers Wells Corporation, moves the Court to enter judgment in favor of defendant, Struthers Wells Corporation, and/or to dismiss the action, and for such other and further relief as defendant, Struthers Wells Corporation, is entitled to.

DEMURRER

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11. The facts alleged in the Complaint do not state a cause of action at Law or in Equity against defendant, Struthers Wells Corporation, for the reasons, among others, that:

Preliminary Objections Filed by Struthers Wells Corp.

1. The action taken respecting the consolidation of the seniority lists was taken by a majority of the membership of the Local Union, and was therefore binding on plaintiffs.

2. Defendant International and defendant Local constituted the statutory collective bargaining agent representing plaintiffs and Struthers Wells Corporation was required by law to negotiate with said International and said Local and any agreements made by Struthers Wells Corporation were required by law to be with said International and said Local only and not with plaintiffs.

3. The 1959 Agreement, negotiated between Struthers Wells Corporation, defendant International and defendant Local, upon approval by a majority of the membership of said Local, was binding on plaintiffs.

4. The 1957 Agreement on which plaintiffs base their claims expired on May 31, 1959.

5. There was no contractual relationship between Struthers Wells Corporation and plaintiffs.

6. Claims of violation of rights of plaintiffs by working out of classification under the 1957 Agreement are admitted by the Complaint to have been found groundless by a duly appointed Arbitrator.

7. The allegations of the Complaint respecting removal of work from the Forge Division and or relocation of work operations by the Employer are immaterial and irrelevant because nothing in the labor agreements or in law requires the Employer to do any particular work at any particular place or location.

8. The Complaint fails to allege that Struthers Wells Corporation, in its sole judgment, has or has decided to close the Forge Division.

9. The Complaint fails to allege exhaustion of plaintiffs' remedies under the 1957 and 1959 Agreements for any alleged violation of the severance pay provisions.

10. Allegations of the Complaint alleging improper action of representatives of Struthers Wells Corporation are immaterial and irrelevant because the Complaint admits that the seniority provisions of the 1959 contract were approved by the membership of the Local Union.

11. The Complaint fails to allege any conspiracy or concerted action against plaintiffs by Struthers Wells Corporation and the other defendants.

12. The Complaint fails to allege that Struthers Wells Corporation in any way interfered with or prevented plaintiffs from following any and all available procedures within the Union organization for redress of any alleged wrongs committed by the Union or any officers or members thereof.

13. The Complaint and exhibits disclose that plaintiffs were not in any way injured by the consolidation of the seniority lists, but were, instead, benefited.

14. The Complaint discloses that the real controversy between the Forge Works employees (plaintiffs) and the Iron Works employees (defendants) was not that seniority rights of plaintiffs were being destroyed, but that the plaintiffs, a minority group, desired and demanded that the seniority of a large number of Iron Works employees be made secondary to that of the minority group.

15. Plaintiffs have adequate remedies under administrative procedures and at law for any alleged wrongs arising out of a labor agreement or agreements and or negotiations for the same, and or out of alleged misconduct of Employer or Union representatives.

Wherefore, defendant, Struthers Wells Corporation, moves the Court to enter judgment in favor of defendant, Struthers Wells Corporation, and or to dismiss the action insofar as Struthers Wells Corporation is concerned, and for such other and further relief as defendant, Struthers Wells Corporation, may be entitled to.

APPENDIX E

PRELIMINARY OBJECTIONS

(Filed by International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers of America (A.F.L.-C.I.O.); Local Lodge 636 thereof; Russell A. Graham, Individually; Lee A. Reisinger, Donald E. Chapel and Harry A. Wiles, Individually, and as Representatives of a Class

To the Honorable, the Judges of Said Court:

Comes now, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers of America AFL-CIO; Local Lodge 636 thereof; Russell A. Graham, individually; Lee A. Reisinger, Donald E. Chapel and Harry A. Wiles, individually, and as representatives of a class by their attorneys undersigned and make these preliminary objections to plaintiff's Complaint in Equity, move the court for judgment and hereby assign the following reasons therefor:

JURISDICTION

I. This Court does not have jurisdiction over the subject matter of this action, for the following reasons, among others:

1. Rights of Union Members and adjudication of matters pertaining to rights of individual Union Members

in that capacity are determined under Federal and State administrative functions preempting the adjudicatory powers of this Court in such matters.

2. The allegations of the Complaint relate to matters arising under labor agreements between an Employer and a Union certified under and pursuant to Federal Law, and can be adjudicated only pursuant to that Federal law which provides the National Labor Relations Board as the appropriate forum.

3. This Court does not have the power to grant the prayed for relief, for to do so would require this Court to either reinstate a contract which all parties agree expired May 31, 1959, or to write a contract between the Company and the Union in violation of Federal Law respecting negotiation of labor contracts, or to decree that seniority shall no longer be deemed a bargainable issue between the Employer and the statutorily certified Union subject to approval of a majority of the membership of the Union within the bargaining unit, which decree would be both in violation of Federal Law and contravention of public policy.

4. Plaintiffs have adequate remedies at law.

Wherefore, defendants, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers of America, AFL-CIO, etc., move the Court to enter judgment in favor of defendants, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers of America, AFL-CIO, etc., and or to dismiss the action, and for such other and further relief as defendants, International Brotherhood

of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers of America, AFL-CIO, etc., are entitled to.

DEMURRER

II. The facts alleged in the Complaint do not state a cause of action at Law or in Equity against defendants, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers of America, AFL-CIO, etc., for the reasons, among others, that:

1. The defendant International and defendant Local were at all times herein pertinent the statutory collective bargaining agent for the bargaining unit of which plaintiffs were members and, as such, were authorized by law to exclusively negotiate with defendant Struther Wells Corporation on behalf of the majority interests and welfare of the members of said bargaining unit, and did so duly negotiate the 1957 Agreement.

2. The action taken respecting the consolidation of the seniority lists was taken by a majority of the membership of the Local Union, and was therefore binding on plaintiffs.

3. Defendant International and defendant Local constitute the statutory collective bargaining agent representing plaintiffs and defendant Struthers Wells Corporation was required by law to negotiate only with said International and said Local and any agreements so negotiated were required by law to be exclusively with said International and said Local and not with plaintiffs;

no ratification by a majority within the bargaining unit being required by law.

4. Even if ratification by a majority were required, the 1959 Agreement negotiated between defendant, Struthers Wells Corporation, defendant International and defendant Local, was ratified and approved by an overwhelming majority of the membership of said Local, and, accordingly, was binding upon plaintiffs.

5. The 1957 Agreement on which plaintiffs base their claims expired on May 31, 1959.

6. Claims of violation of rights of plaintiffs by working out of classification under the 1957 Agreement are admitted by the Complaint to have been found groundless by a duly appointed and impartial Arbitrator.

7. The Complaint fails to allege any requirements within the Local that this bargaining agent sponsor or process the personal grievances of a few individual members stemming from their dissatisfaction with a course of action taken by the vast majority of the bargaining unit.

8. The Complaint fails to allege any conspiracy or concerted action against plaintiffs by International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers of America, AFL-CIO, etc., and the other defendant.

9. The Complaint and exhibits disclose that plaintiffs were not in any way injured by the consolidation of the seniority lists, but were, instead, benefited.

10. The Complaint discloses that the actual dispute between plaintiffs and defendants was not that seniority

rights of plaintiffs were being destroyed, but that the plaintiffs demanded that the seniority and employment potential of a large number of Iron Works employees *and the bargaining unit as a whole* be subordinated to the self-serving interests of the minority group.

11. Plaintiffs have adequate remedies under administrative procedures and at law for any alleged wrongs arising out of a labor agreement or agreements and/or negotiations for the same, and/or out of alleged misconduct of Employer or Union representatives.

Wherefore, defendants, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers of America, AFL-CIO, etc., move the Court to enter judgment in favor of defendants, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers of America, AFL-CIO, etc., and/or to dismiss the action insofar as International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers of America, AFL-CIO, etc., are concerned, and for such other and further relief as defendants, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers of America, AFL-CIO, etc., may be entitled to.

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IN THE

Supreme Court of the United States

NO. 751 OCTOBER TERM, 1963

F. J. COSMARK, JOHN C. MARTIN and MELVIN D. PATTERSON, Individually, and as Representatives of a Class, Petitioners

v.

STRUTHERS WELLS CORPORATION; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS OF AMERICA (AFL-CIO); LOCAL 636 Thereof; RUSSELL A. GRAHAM, Individually; LEE A. REISINGER, DONALD E. CHAPEL and HARRY A. WILES, Individually, and as Representatives of a Class, Respondents

BRIEF OF STRUTHERS WELLS CORPORATION OPPOSING THE PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania, dated October 17, 1963, 412 Pa. 211, 194 A. 2d 325, is printed in Appendix B, pages 26 to 35, of the petition for certiorari.

In addition, the opinion of the Court of Common Pleas of Crawford County, No. 3 September Term, 1960, which is not officially reported, is printed as Appendix 1 to this brief.

COUNTER-STATEMENT OF QUESTION INVOLVED

Has a state court jurisdiction to grant an injunction and damages for acts which are unfair labor practices under the National Labor Relations Act, where the plaintiffs' claim is not based upon an agreement, but is contrary to the provisions of the collective bargaining agreement negotiated by the employer and the union?

COUNTER-STATEMENT OF THE CASE

This is an action in equity brought in a state court by the petitioners against their International Union, their Local Union, their fellow employees and their Employer.

The Complaint is very long (App. C, 36-84), but the facts are simple.

The Union was (and is) the duly certified collective bargaining agent for a bargaining unit of employees of Struthers Wells Corporation in Titusville, Pennsylvania. (App. C, 38).

Struthers Wells and the Union entered into written collective bargaining agreements beginning at least as far back as 1945 and continuing through the dates material to the suit. (App. C, 41, 43).

There were two divisions or operating units of the Company in which the employees represented by the Union worked. One was the forge division. The other was the iron works division. By a long series of collective bargaining agreements beginning in 1945, and approved by the employees of both divisions until about

1957, separate seniority lists were established for the forge division and the iron works division. (App. C, 41). Thus forge employees had no seniority in the iron works and iron works employees had no seniority in the forge division.

One such agreement was dated June 19, 1957. It expired May 31, 1959.

In June, 1957, there were about 108 men represented by the Union in the forge division and about 150 men represented by the Union in the iron works division. (App. C, 39, 40). Thus the number of employees in the bargaining unit[1] at that time was about 258.

Early in August, 1957, Struthers Wells asked the Union to agree to combine the seniority lists into a single list, regardless of the division or plant where they were employed. (App. C, 46). The Union rejected this proposal and no new agreement was reached.

The Complaint alleges that in August, 1957, the Company began to transfer machinery and work from the forge division to the iron works (App. C, 46, 47), and that this continued until April, 1959, by which time there were no operations left in the forge division which could provide employment for the Union men on the roster there. (App. C, 63).

During this period Struthers Wells continued to urge the Union to agree to dovetail and combine the seniority lists, but the Union would not agree. (App. C, 51-52).

---

1. It is important to bear in mind that this was a single bargaining unit, as plaintiffs admit. (App. C, 38).

Then on January 19, 1959, Struthers Wells proposed to the Union that the lists be combined by placing the forge shop employees at the bottom of the iron works list, but giving the forge shop employees full credit for length of service for vacation and other benefits. (App. C, 60). The Union would not agree.

Finally, the Complaint alleges, Struthers Wells in April, 1959, said it would refuse to bargain and would close the plant if the Union refused to combine the lists. (App. C, 63).

In May, 1959, the Union finally agreed to put the forge employees at the bottom of the iron works seniority list with seniority from May 1, 1959. This arrangement has been in effect ever since. (App. C, 43, 63-64).

Plaintiffs allege that the Union refused to process their grievance protesting transfer of forge work to the iron works without new arrangements under which their seniority would give them jobs in the iron works. (App. C, 54-57)

They claim that the Union's hostile attitude and alleged discrimination against them was motivated by the selfish desires of the iron works employees to further their interests as against the interests of the forge employees. (App. C, 48-49).

As plaintiffs admit, this was a claim that the Union should agree to displace iron works employees in order to give work to men on the forge division roster. But throughout the period involved, the iron works employees outnumbered the forge employees, and as a result a vote by all members of the unit ultimately resulted in a decision against giving any of the forge employees

seniority superior to that of the iron works employees on the work which, the Complaint alleges, was being done in the iron works.

In short, the plaintiffs' Complaint has been that a selfish majority of the bargaining unit refused to give up any of their seniority in the iron works, which was expanding, to the minority who worked in the forge division, and which was drying up.

Having no seniority rights in the iron works, and no work in the forge division, the plaintiffs were laid off.

The Complaint against the Company seems to be that it was unsuccessful in its efforts to get the Union to agree to merge the seniority lists until 1959, and that the agreement it finally did get was not good enough.

The plaintiffs asked that the Court:

(a) Restore the plaintiffs to the seniority and related rights they had under the 1957 agreement;

(b) Award back pay for the period of layoff, or, in the alternative, severance pay;

(c) Award costs and attorney's fees;

(d) Award punitive damages;

(e) Enjoin any retaliation against plaintiffs;

(f) Enjoin any interference with seniority of plaintiffs.

Both the Company (App. D, 95) and the Union (App. E, 101) filed preliminary objections. The Court of Common Pleas sustained the preliminary objections on two grounds. For convience in reference, the Court's opinion is attached hereto as Appendix 1.

Counter Statement of the Case.

First, the Court held (App. 1, page 37):

"* * * we hold that jurisdiction in this matter is in the NLRB and that the State Courts must yield thereto."

Second, the Court said (App. 1, page 37):

"* * * since we assume an appeal will be taken, we will make a decision on the other preliminary objections which, if sustained, would necessarily result in dismissal of the complaint.

"These involve two contentions. First, the contention of the defendants that the plaintiffs have stated no cause of action and secondly, the contention by the plaintiffs in the alternative that they are entitled to severance pay if not the restoration of their seniority rights."

As to the first contention, the Court observed that under the 1957 contract the plaintiffs had no seniority at all in the iron works, and that all the Company did was try to get the Union to agree to make a new agreement under which they would be given some seniority there.

As the Court put it (App. 1, page 41):

"We are wholly unable to see how the court has any right to say to these parties that they must go back and rewrite this contract by dovetailing the seniority rights of the forge employees with the iron works employees even though this may result in the necessity of laying off seventy or eighty iron works employees whose seniority will be thereby superseded. It, therefore, is our conclusion that the demurrer must be sustained."

With regard to the claims against the Union, the Court found the plaintiffs had not exhausted their administrative remedies. (App. 1, pages 42, 43),

With respect to the claim for severance pay, the Court noted the existence of a grievance procedure terminating in arbitration. (App. 1, pages 45, 46). Since there is no allegation that any attempt was made to file or process a grievance or to arbitrate this question, the Court, citing *Falsetti v. Local Union No. 2055, United Mine Workers of America*, 400 Pa. 145 (1960), sustained the preliminary objections on this point also.

On appeal to the Supreme Court of Pennsylvania, that Court held (412 Pa. 211) that the state court jurisdiction had been preempted by the National Labor Relations Act.

In so holding, the Court pointed out that this was in no sense a suit alleging a violation of a contract, but rather, as the Court below had observed, an attempt to force recision of an existing contract regularly negotiated by a legally competent union, and then the creation of a new one more to the plaintiffs' liking. (App. B, 33-35).

In view of its conclusion that the Court below had no jurisdiction, the Pennsylvania Supreme Court found it unnecessary to pass on the remaining questions.

REASONS FOR REFUSING THE WRIT

A. Absence of Any New Important Question

Petitioners in their statement of questions presented make one error of fact which is of controlling importance.

They say that this is an action "* * * based upon * * * violation of an existing agreement * * *."

As the Court of Common Pleas and the Supreme Court both observed, and as the Complaint clearly shows, this is not in any sense an action based on an existing contract.

By their own pleading they admit that under the 1957 contract they had no seniority whatsoever in the iron works, and they want the 1959 contract rescinded. The action cannot be based upon either agreement.

This action could not possibly be brought under Section 301 of the *Labor Management Relations Act*, 29 USC, § 141, et seq.

If it were an action for breach of contract, as the Pennsylvania Supreme Court recognized, the rule announced in *Smith v. Evening News Association*, 371 US 195, 83 S. Ct. 267, might apply.

However, the Struthers Wells contract provides for arbitration, whereas the *Evening News* contract did not, so that it is doubtful that the state court would have jurisdiction to do more than order arbitration in a proper case.

The question presented is of importance only if the Court has decided, or wishes to decide, that the state

courts are to have concurrent jurisdiction with the National Labor Relations Board over every unfair labor practice.

The Court has not indicated such a desire. On the contrary, in *Local 100 v. Borden*, 373 US 690, 83 S. Ct. 1423 (1963), the Court reaffirmed the importance of retaining exclusive jurisdiction in the National Labor Relations Board in such cases.

Insofar as Struthers Wells is concerned, there is no allegation of any fact to show that the Company participated in the alleged breach of the duty of fair representation by the Union. It is noteworthy that the argument in the petition never mentions any Company participation.

At the very most, the Company is alleged to have sought, unsuccessfully, an agreement to dovetail the two seniority lists (App. C, 46); is alleged to have transferred work without giving the Union an opportunity to bargain (App. C, 47); and is alleged to have proposed an agreement to place the forge employees on the iron works seniority list (App. C, 60-61); and to have insisted on a second vote after the proposal was rejected (App. C, 61); and finally to have insisted on agreement to its proposal under threat of closing the plant. (App. C, 63).

The Company could not unilaterally consolidate the seniority lists without violating both the law, *Erie Resistor Corp. v. NLRB*, 373 US 221, 83 S. Ct. 1139 (1963), and the contract. It could not lawfully grant the forge workers seniority in the iron works to the detriment of employees already having seniority there without bargaining with the Union.

The allegation that it proposed changes to the Union, which was the only lawful way it could accom-

plish them, certainly does not implicate it in any breach of a duty of fair representation.

Assuming the transfer of work was a breach of contract, a remedy was provided in the grievance and arbitration procedures. Had the Union decided there was a breach, it could have forced arbitration under the broad arbitration provisions. (App. C, 90-91). *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 US 574 (1960).

If it were shown, as is alleged, that the Company insisted on its proposed consolidation of the lists under threats of refusal to bargain and of closing the plant, this would have been an unfair labor practice in violation of Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act. If, as a result, plaintiffs had been laid off or discharged, this would have been a violation of Section 8(a)(3), for which pay and interest could be awarded by the Board. And any effective attempt to dominate the Union would have been an unfair labor practice in violation of Section 8(a)(2).

But these alleged violations of the federal statute are not to be redressed in the state court. Here there is no allegation that the Company participated in any breach of the duty of fair representation. Instead, the Complaint shows at the most that it committed an unfair labor practice, or a series of unfair labor practices. The arguments in the petition are based upon a premise found not to be the fact by both the Court of Common Pleas and the Pennsylvania Supreme Court, and completely without support in the Complaint.

Whether the question posed by the petitioners would be important if the facts were otherwise we cannot say, but under the facts as they appear in the Complaint the Courts below were simply applying settled law.

B. The Decisions of the State Courts Are Wholly in Accord With Established Federal Law

Reduced to essentials, the petitioners want to establish that any minority group in a bargaining unit represented by a certified collective bargaining agent can have the grievance decisions and collective bargaining agreements made by that agent voided and rewritten by a state court.

The Pennsylvania Supreme Court, relying upon its own decisions and those of this Court, found it inconceivable that the federal policy is to permit the state courts to police collective bargaining and to substitute their probably divergent views for those of the Labor Board as to how collective bargaining agent's statutory duties should be carried out.

In relying on cases such as *Syres v. Oil Workers Int'l. Union*, 350 US 892 (1955), and *Steele v. Louisville & N. R. Co.*, 323 US 192 (1944), petitioners overlook a controlling distinction.

Discrimination between employees because of their race is a breach of duty because race is a classification not relevant to the union's statutory bargaining powers.

In contrast, classification of employees by seniority is certainly relevant to the union's statutory bargaining powers. Cf. *Steele v. Louisville & N. R. Co., supra.*

The mere fact that the seniority agreement is to the advantage of some employees and to the disadvantage of others gives no support whatsoever to an allegation that the Union has failed in its duty. This must be true of every seniority agreement. *Ford Motor Co. v. Huffman*,

345 US 330 (1953). Cf. *Trailmobile Company v. Whirls*, 331 US 40 (1947); *Aeronautical Industrial District Lodge v. Campbell*, 337 US 521 (1949).

And allegations, however bitterly phrased, which do no more than state that the Union submitted this difficult problem to a vote by the membership, and then did what the majority wanted, state no cause of action, even though the motives of the majority may have been selfish.

Indeed, a much closer question would be presented if the Union had disregarded the majority vote and made an agreement destroying the seniority enjoyed by the iron works employees in the seniority unit that had existed for more than fourteen years.

The decision of the Court of Common Pleas that the Complaint failed to state a cause of action was clearly correct and in accord with federal law. Cf. *Humphrey v. Moore*, ... US ...., Docket No. 17, 32 U.S. Law Week 4055, decided January 6, 1964, as were the decisions of the Court of Common Pleas and the Pennsylvania Supreme Court that under the facts set forth in the Complaint, the state courts were without jurisdiction. *Local 100 v. Borden, supra*).

Finally, it seems fair to observe that even if, by some new interpretation of the preemption decisions of this Court, the state courts could be held to have jurisdiction, the decision of the Court of Common Pleas dismissing the Complaint because it failed to state a cause of action is clearly correct, and the affirmance by the Pennsylvania Supreme Court is likewise correct, even though not specifically based upon the same reason.

Conclusion.

As Mr. Justice Brandeis said in *Helvering v. Gowran*, 302 US 238, 245 (1937):

> "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."

Under the very recent decision of *Humphrey v. Moore, supra*, the state courts must have arrived at this same conclusion regardless of the preemption question. Consequently, no question meriting review is presented.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: February 13, 1964.

APPENDIX

Opinion Sur Preliminary Objections To Plaintiffs' Complaint

MOOK, P. J.

This is an action in equity brought by the plaintiffs individually and as representatives of a class of fellow workers designated as "forge employees" against their employer, Struthers Wells Corporation, the International Union of which they are members, the Local Union, Russell A. Graham, President of the Local and District Representative, and Lee A. Reisinger, Donald E. Chapel and Harry A. Wiles, individually and as representatives of another group of employees known as the "iron work employees." In their complaint the plaintiffs seek restoration of their formerly held positions of employment and seniority as they existed under a collective bargaining agreement entered into between the company and the union in 1957 and also damages for loss of wages, vacation pay and severance pay which they claim they were improperly and illegally deprived of by joint and concurrent wrongful action of the defendants. They also seek an order restraining the union defendants from invoking any retaliatory action against them by reason of their having instituted this proceeding and such further relief as the court may deem appropriate to grant.

The complaint is lengthy and involved, consisting of seventy-nine paragraphs of pleading, and it has been difficult for the court to condense the allegations within reasonable limits appropriate to an opinion. We shall endeavor to set forth principal contentions of the plaintiffs in order that we may properly consider their right

to relief in a court of equity which has been challenged by the defendant's preliminary objections.

The bill alleges that the defendant corporation, referred to as the employer, is engaged in the fabrication, construction and manufacture of boilers and high pressure vessels and maintains various plants in the city of Titusville, Crawford County, Pennsylvania, in which it carries on its activities. One of the plants is known as the Forge Shop, another is known as the Iron Works Shop which are situated at two different locations. In paragraph seven it is averred that the plaintiff class is composed of individuals who were employees of the Forge Division on June 19, 1957 referred to as the forge employees numbering approximately 108 men, other than the three individually named plaintiffs, however, we observe from the complaint that only 70 others are joined in the action. The bill also alleges that the defendant class known as the iron work employees numbered approximately 150 employees in 1957 and that additional employees were employed thereafter so that on May 1, 1959 they numbered approximately 250 employees.

In 1945 the defendant employer and the defendant international and local unions by a collective bargaining agreement established and put into practice a separate seniority list for each of the divisions and this provision was incorporated in subsequent collective bargaining agreements until 1957 when on June 19 a new agreement was entered into which will be referred to as the 1957 agreement which continued in effect until May 31, 1959. Plaintiffs aver that by virtue of this agreement the forge employees had seniority rights of three to fourteen

years with an average seniority of approximately ten years; also vacation rights and severance pay rights as is common and usual in such labor agreements.

The basis of the plaintiffs' complaint lies in the fact, as pleaded in the seventeenth paragraph, that on September 23, 1959 the defendant employer and the international and local union entered into a new collective bargaining agreement effective as of June 1, 1959 under which the separate seniority rosters established in 1945 and contained in the 1957 agreement were eliminated and the names of all the forge employees, including the plaintiffs in this case, were placed at the bottom of the Iron Works Division seniority list as of May 1, 1959.

The bill then goes on to allege that this 1959 agreement was "invalid, improper, void and illegal." In support of this contention it is alleged that beginning in 1957, in spite of the provisions of the 1957 agreement, the company, through its personnel director, began making overtures to the union defendants to agree to a combined seniority list. The company then began to move machinery and work which had been performed in the Forge Division to another shop known as the Perry Forge Shop and the Iron Works Shop and began to hire new employees to perform work which had formerly been performed by the forge employees, which new employees were designated as iron work employees. Plaintiffs further allege that the defendant union officers engaged in a course of conduct which was unfair, malicious, prejudicial and arbitrary by inciting the iron work employees against the forge employees, their object being to prevent the forge employees from having seniority over any of the iron work employees including the newly

hired members. It was then alleged that at the November 1957 meeting of the local union a plan combining the seniority rosters of the two divisions which recognized all of the seniority rights of all the employees in the unit was adopted by a standing vote but that the iron works employees prevailed upon the president of the local union to permit a second vote which rescinded the previous action by one vote. It is alleged that this procedure was illegal and void because the secretary of the local permitted newly employed workers to vote who were not yet members of the local. At a meeting in December 1957 another effort was made by the forge employees to adopt a plan for the straight consolidation of the seniority lists which was unsuccessful, according to the complaint, by reason of the conduct of the defendants in permitting these new workers to vote who by this time outnumbered the forge employees. Thereupon the forge employees made an effort to have the defendant secretary of the local union removed from his office by reason of the alleged unfair, malicious and prejudicial conduct. It was alleged that the defendant president of the union refused to process the complaint.

It is next alleged that although the officers of the defendant company assured the forge employees there would be continuous employment for them at the Forge Division Plant that the company continued to remove machinery from the Forge Shop to the Iron Works and Perry Forge Shop and furloughed Forge Shop employees with greater seniority than many of the Iron Works employees particularly those recently hired. During this time the defendant employer repeatedly urged the defendant local to agree upon a combined seniority list.

It is then alleged that the defendant local union officers in furtherance of their plan to discriminate against the forge employees permitted the iron works employees to work out of classification and as a result the defendant employer, in April 1958, transferred more equipment and a large quantity of unfinished work then in process at the Forge Division to the Iron Works Division. The forge employees then filed a grievance against the company by reason of this procedure but the complaint alleges that the defendant union officials refused to accept and process the grievance. The bill alleges that by reason of the actions of the defendant employer and the aribtrary, unreasonable, discriminatory and improper actions of the defendant union officials, it was impossible for the plaintiffs to further process their grievance and futher action on their part was useless and futile in view of the attitude and action of the defendants. Nonetheless, the plaintiff forge employees requested permission of the defendant president of the local to file a written grievance with the international president which permission the defendants refused.

Despite their refusal the forge employee plaintiffs addressed their grievance to the president of the international for which they were bitterly reprimanded by officials of the local defendant. The grievance petition was forwarded to the international vice president in charge of the Allegheny section who came to Titusville and held a meeting but it is alleged that the plaintiffs did not receive notice of the meeting until late in the afternoon and only two were able to attend. Hence nothing came of it but the defendant officials of the local threatened to have them expelled from the union by reason of their having filed the grievance.

By September 1958 by reason of defendant employer having transferred machinery from the Forge Plant to the Perry Forge Plant and the Iron Works, the number of forge workers who were employed had been reduced to 32 while the number of iron work employees had been increased to approximately 215. Thereafter it is alleged that the company, acting through its personnel director, presented to the defendant local, through its then officers, a proposal to establish a new combined seniority list which provided that all forge employees would be added to the bottom of the iron works seniority list. This proposal was first presented to the union at a meeting January 1959 when the newly elected president ruled that only the forge employees were entitled to vote on it, with the result that it was overwhelmingly rejected. The bill then alleges that when this information came to the attention of the company, the personnel director requested that the matter be resubmitted for another vote of the membership of the local in order that he could arrange to have sufficient votes in favor of it to secure its adoption.

The plaintiffs alleged by reason of the aforesaid improper, unfair and discriminatory actions of the defendant employer and the defendant local union officials, a group of forge employees, two of whom were plaintiffs Martin and Patterson, filed unfair labor practice charges against the defendant employer and the defendant local union with the National Labor Relations Board District Office at Pittsburgh. It is then alleged that although complainants attempted to process the charge they were advised by a representative of the National Labor Relations Board that under the National Labor Relations

Act the matters complained of were not within its jurisdiction and that no relief could be granted and recommended that the complaints be withdrawn which was done.

Whether or not a second vote was taken at this time does not appear from the bill but it is thereafter alleged that in April 1959 defendant employer and defendant local began negotiating a new bargaining agreement to become effective after May 31, 1959 and that the defendant employer's representative informed the local that unless they first disposed of the "seniority issue" in accordance with the employer's proposal of January 1959, it would refuse to further negotiate and would bring to a close all of its operations in Titusville. By reason of this demand a special meeting of the local was held on May 2, 1959. At the special urging of the defendants Graham and Wiles, the defendant local, including the iron works employees including those newly employed since August 1957, who outnumbered the forge employees, approved the employer's proposal and adopted a consolidation plan under which the seniority of all forge employees would begin as of May 1, 1959 regardless of length of service in the union.

Following this action the forge employees appealed in writing to Russell K. Berg, International Vice President of the defendant union for an investigation of the activities of the defendant local and defendant employer whereupon Vice President Precht of Denver, Colorado, was assigned to make such an investigation. The complaint alleges that Mr. Precht came to Titusville and called a special meeting of the defendant local and informed the membership that his investigation revealed

that the union leadership during the period following the execution of the 1957 agreement was deficient and that the actions of the defendant local and its officials and the iron works employees with relation to the seniority rights of the forge employees were illegal, improper and contrary to established union policy and that the forge employees were entitled to have their seniority rights restored, or at least, to receive their severance pay if the Forge Shop had been closed permanently. He informed the membership of the defendant local that he would recommend to the international president that the action of May 2, 1959, of the local with relation to seniority, be overruled and rescinded and that the seniority rights of the forge employees be restored. But notwithstanding the recommendation of Mr. Precht, nothing further ever happened.

Plaintiffs thereafter alleged that they learned in the fall of 1959 that the defendant international and local executed the 1959 agreement for a period from June 1, 1959 to July 30, 1960, in which the plan of seniority adopted by the defendant local on May 7, 1959, was finally put in effect.

Plaintiffs therefore aver that they have exhausted all and every remedy and procedure available to them under the International Lodge Constitution and the Subordinate Lodge Constitution and By-laws notwithstanding the wrong done to them; they further allege that from April 1, 1959 all the forge employees had been laid off and continued to be laid off for a period of approximately fourteen months and that all operations at the Forge Shop had ceased; and that most of the forge employees who had been laid off would have been em-

ployed during the entire period had it not been for the fact that their seniority rights had been deprived of them by reason of the actions of the defendant employer and defendant local and its officials. They complain that by reason of the conduct of the defendants, that they have therefore been deprived of their wages, which they would otherwise have earned, their vacation pay, and loss of rights on lay-off, reinstatement, advancement and severance pay.

The plaintiffs further allege that in the alternative that the actions of the defendant employer in transferring the work and machinery from the Forge Shop constituted a permanent discontinuance of the department within the terms of the 1957 agreement and they were at least entitled to severance pay provided for in said agreement.

In conclusion the plaintiffs allege that the acts of the international and local were improper and wrongful in the following respects:

(a) The plan for consolidation of their seniority lists was not fair and reasonable.

(b) The plan . . . was arbitrary and discriminatory.

(c) The defendants local and international breached their fiduciary duty to fairly represent all members of the bargaining unit . . . including the minority group, the forge employees, the plaintiffs herein.

(d) The defendants local and international breached their fiduciary duty owed to all members of the unit on whose behalf they were bargaining agents, and specifically the plaintiffs . . .

(e) The actions of the defendant local were directed and executed by the defendants Graham and Wiles (officials of the defendant local), who because of their open hostility, personnel animosity and selfish motivation . . . treated the seniority and other rights of the forge employees—a minority group of the bargaining unit—with bad faith, fraud and discrimination, in a deliberate attempt to deprive them of all of their rights as members of the bargaining unit.

(f) The defendant local acted in concert with the defendant employer by engaging (in such activities) to serve the interests and objectives of the employer, to the detriment of the forge employees, in disregard of all of the duties owed to them as members of the bargaining unit . . .

The plaintiffs then alleged that the acts of the defendant employer concurrent with the acts of the defendants international and local were improper and wrongful in the following respects:

(a) The defendant employer proposed, urged and then demanded the plan for consolidation of the seniority lists . . . which plan was not fair and reasonable . . .

(b) The defendant employer proposed, urged and then demanded the plan for consolidation . . ., which plan was arbitrary and discriminatory in that, without any proper cause or justification, and without any reasonable basis, the forge employees were caused to lose all of their seniority status to the advantage of the iron works employees, many of whom had accumulated much less seniority.

(c) The defendant employer, by its gradual removal of the work and machinery from the Forge Shop to the Iron Works and the Perry Forge Shops, and the hiring of new men to do the said work, while laying off the Forge Employees as above mentioned, committed continuing and flagrant breaches of the seniority provisions of the 1957 agreement.

(d, e, f, g, h) It is alleged that the conduct of the defendant employer was calculated to create dissension and strife within the union, to weaken the strength of the Forge Employees, and to deprive the Forge Employees of their rights.

It is further alleged that the defendant Graham, president of the local, refused to perform the duties of his office, that his acts were illegal and done with hostility and personal animosity toward the forge employees and with disregard of the duties owed to them by the local as a bargaining agent. Plaintiffs therefore prayed the court:

A. To order the Defendants to return the Plaintiffs to their rightful positions, classifications, seniorities and related rights . . . including all previous rights belonging to each of the Plaintiffs under the 1957 Agreement, . . .

B. To order the Defendants Employer, International, Local and Graham to pay to the Plaintiffs the full compensation for loss of wages and vacation pay . . . together with six (6%) per cent interest thereon.

C. To award to the Plaintiffs all costs and reasonable attorney fees.

D. To award to the Plaintiffs such punitive damages as the Court may deem proper . . .

D. & F. To enter an appropriate decree restraining and prohibiting the defendants from any retaliatory action.

G. & H. To grant such further relief as may be appropriate.

All of the defendants have filed preliminary objections to the complaint which are identical in substance and in some parts identical in language.

The preliminary objections in substance are as follows:

(1) The matters complained of in the complaint are exclusively within the jurisdiction of the National Labor Relations Board;

(2) The facts complained of in the complaint do not state a cause of action in law or in equity against the defendants and they, therefore, demur of the complaint;

(3) The complaint improperly combines causes of action ex contractu and causes ex delicto;

(4) A motion to strike; defendants move to strike numerous paragraphs on the grounds that they are conclusions and are irrelevant and immaterial;

(5) A motion for a more specific complaint; numerous paragraphs of the complaint are vague, indefinite and lacking in particularity.

The foregoing, of course, is only a condensation of the preliminary objections but in brief they set forth

the contentions advanced by defendants in their arguments and in the lengthy briefs filed they assert that the court has no jurisdiction and that plaintiffs have stated no cause of acion.

The case was vigorously argued before the court by counsel for all of the parties and lengthy briefs and reply briefs have been filed by each of the parties which we have endeavored to study with great particularity as the subject was entirely new to this court before we began our study. Because it has been time consuming and because we have had so many interruptions to handle countless other matters before we could get an opportunity to prepare an opinion, disposition of this case has been necessarily delayed.

However, we shall undertake to first address ourselves to the question of the jurisdiction of this court. We must decide whether or not exclusive jurisdiction of this controversy has been vested in the National Labor Relations Board under the Labor Management Relations Act of 1947 commonly known as the Taft-Hartley Act. The defendants contend that the plaintiffs are, in effect, charging them with having committed unfair labor practices within the meaning of that act and since such conduct is regulated, prohibited and protected by the National Labor Relations Act, Congress has preempted jurisdiction in the National Labor Relations Board and the State Courts cannot interfere. Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776, 346 U. S. 485, 74 S. Ct. 161.

The National Labor Relations Act, Section 7, 29 U.S.C.A., Section 157 provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in section 158(a)(3) of this title. July 5, 1935, c. 372, Section 7, 49 Stat. 452; June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, Section 101, 61 Stat. 140."

Thereafter Section 8, 29 U.S.C.A. Section 158 provides:

"(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization . . .

(5) to refuse to bargain collectively with the representatives of his employees . . . "

The act further provides in section (b):

"It shall be unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of the subsection (a)(3) of this section . . . "

Section 10(a), 29 U.S.C.A. 160(a) of the same act gives the National Labor Relations Board the jurisdiction and power to prevent such unfair labor practices in industries affecting interstate commerce and empowers the Board to grant indicated relief. It is admitted by the parties here that the Struthers Wells Corporation is engaged in interstate commerce and that this case comes within the jurisdictional yardstick of the National Labor Relations Board. If, therefore, the activities complained of are subject to sections 7 or 8 of the National Labor Relations Act, exclusive jurisdiction is in the National Labor Relations Board and the grievances are not subject to litigation in the State or Federal Courts. Baker v. Shopmen's Local Union No. 755, 403 Pa. 631; Wax v. International Mailers Union, 400 Pa. 171; San Diego Building Trades Council v. Garmon, 359 U.S. 236.

The plaintiffs, however, assert in their brief that the sole purpose of section 158(a) is to prevent an employer from interfering with the right of employees to join unions guaranteed by section 157. Hence they say in their brief:

"It is clear, by a mere reading of the above-quoted unfair labor practices under the Act that the discriminatory treatment prohibited by the Act is related to the object which the entire Act attempts to achieve, that is, the freedom of employees to organize and the process of collective bargaining. Thus, subsection (a)(3) of Section 158 states that it is an unfair labor practice for an employer to

discriminate in regard to hire or tenure of employment or any term or condition of employment *to encourage or discourage membership in any labor organization.* It is this same subsection which is referred to in subsection (b)(2) where it is declared to be an unfair labor practice for a labor organization to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3).

Certainly no case has been cited by the Defendant Employer, and we know of no case which holds or intimates that any kind of discriminatory treatment by an employer or union directed toward an employee, or group of employees, constitutes an unfair labor practice and that the NLRB has jurisdiction in all such cases. As will be indicated shortly, the cases are quite to the contrary."

In fairness to plaintiffs' counsel we can say that this brief was prepared before the Supreme Court of Pennsylvania handed down its decision in the case of Baker v. Shopmen's Local Union No. 755, supra, which case, we think, is decisive of the present controversy. In that case, which was an action in equity similar to the present one, the Supreme Court speaking through Mr. Justice Eagen, summarized the plaintiff's complaint as follows:

"In the instant case, the plaintiffs charge the defendants with conspiracy and activities to injure their employment status through deprivation of seniority rights. Call it discrimination, breach of duty, unfair dealing, or by any other name, that is the basic element of the cause stated. Relief and

damages are sought for an alleged unlawful interference by the union and the employer with rights the plaintiffs are entitled to as employees. This is an unfair labor practice: Wax v. International Mailers Union, supra."

The opinion then went on to cite certain specific allegations in the complaint and continued as follows:

"This type of activity is at least arguably, if not more, subject to Section 7 or 8 of the Act, in violation thereof, and within the protection of Section 10: Holman v. Industrial Stamping and Mfg. Co., 344 Mich. 235, 74 N.W. 2d 322, 29 Labor Cases 69, 651 (1955); McNish v. American Brass Co., 139 Conn. 44, 89 A. 2d 566, cert. den. 344 U. S. 913 (1952); NLRB v. Wheland Co., 271 F. 2d 122 (C.A. 6, 1959); NLRB v. Dallas General Drivers, Local 745, 228 F. 2d 702 (C.A. 5, 1956). This being so, jurisdiction in the state courts is ousted, unless and until there is a subsequent determination by the NLRB, stating that such activity is not within the protection of its domain. There can be no duplication of remedies. A conflict of authority and in administration would result. Congress has entrusted responsibility in this area to an administrative agency, the NLRB, equipped with specialized and expert staff facilities to properly entertain such problems and to effectuate the intent of Congress and a national labor policy: Garner v. Teamsters C. & H. Local Union, supra. This is true even though non-violent tortious conduct redressable under state law could possibly be involved, such as a tort involving the interference with employment. If

unfair labor practices are also present, the federal power is controlling and superseding. 'Controlling and therefore superseding federal power cannot be curtailed by the state even though the ground of intervention be different than that on which federal supremacy has been exercised.' Weber v. Anheuser Busch, Inc., 348 U. S. 468, 480, 75 S. Ct. 480, 99 L. Ed. 546 (1955)."

While plaintiffs in the present complaint never used the word "conspire," it is clear from a reading of the complaint that the plaintiffs over and over again allege that the defendant employer and the defendant union acted in concert to deprive the plaintiffs of their seniority rights. To repeat again what Justice Eagen has so well stated:

> "Call it discrimination, breach of duty, unfair dealing, or by any other name, that is the basic element of the cause stated."

In the interest of brevity we will refrain from laboring the points asserted by the defendants in their briefs concerning specific unfair labor practices alleged to have been pleaded in the complaint. However, we will point to one set forth in paragraph 60 which contains the following allegation:

> "In early April, 1959, the Defendant Employer and the Defendant Local began negotiating a new collective bargaining agreement to become effective after May 31, 1959, during which negotiations, the Defendant Employer's representatives informed the representatives of the Defendant Local that unless they first disposed of the 'seniority issue' in accordance with the Employer's proposal of January 19,

1959, above set forth, it would refuse to further negotiate and would bring to a close all of its operations at Titusville."

If the foregoing allegation is true it is obvious that such conduct is in direct violation of section 8(a) 1 and 5 of the Taft Hartley Act and is defined as an unfair labor practice. It follows that the National Labor Relations Board has exclusive jurisdiction over the matter complained of.

Plaintiffs, however, argue that they filed a complaint with the Board and were advised to withdraw it because the Board didn't have jurisdiction. Hence they contend that if the court doesn't take jurisdiction of this case, they have no remedy for their complaint.

This, of course, does pose a serious problem for the plaintiffs if they were told by some representative of the Board that it did not have jurisdiction and were thereby led to withdraw their complaint. However, this court can't assume jurisdiction of this case upon the dictum of some unknown representative of the Board in the face of decisions of both the Supreme Court of Pennsylvania and the Supreme Court of United States which in our judgment clearly hold that this is a case for the National Labor Relations Board. In the case of San Diego Building Trades Council v. Garmon, supra, commonly referred to as the "second Garmon case," the Supreme Court of the United States, speaking through Mr. Justice Frankfurter, said:

"When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by section 7 of the National Labor Rela-

tions Act, or constitute an unfair labor practice under section 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law . . .

* * * * * * *

"To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of status of a disputed activity. If the Board decides, subject to appropriate federal judicial review, that conduct is protected by section 7, or prohibited by section 8, then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States. However, the Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with uncloaded legal significance. This was the basic problem underlying our decision in Guss v. Utah Labor Relations Board, 353 U.S. 1, 77 S. Ct. 598, 609, 1 L. Ed. 2d 601. In that case we held that the failure of the National Labor Relations Board to assume jurisdiction did not leave the States free to regulate activities they would otherwise be excluded from regulating. It follows that the failure of the Board to define the legal significance under

the act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. The withdrawal of this narrow area from possible state activity follows from our decisions in Weber and Guss. The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy."

In the present case there has never been any decision by the National Labor Relations Board that it had no jurisdiction over the matter of the controversy. As pleaded, some representative of the Board told the plaintiffs they should withdraw their complaint and acting upon his advice they did so. Hence, the Board never acted at all. Thus, while we can understand the plaintiffs' irritation at being told by the Board that it didn't have jurisdiction and then being told by the Court that it doesn't have jurisdiction because the Board does, we are at least making a decision on the matter and not merely handing out gratuitous advice and plaintiffs may appeal from our decision.

The plaintiffs have cited in their brief a considerable number of Supreme Court decisions which it is contended uphold their decision to have their rights adjudicated in the State courts. In order to keep this opinion within reasonable limits, it is impossible for us to discuss these

cases but we have read them all and find none that are controlling in the present situation.

However, we may say that in the case of Bailer v. Local 470 International Teamsters, Chauffeurs, Warehousemen and Helpers, 400 Pa. 188, furnishes no support for plaintiffs' contentions. The court there said (p. 192):

> "Appellant avers in his first claim that the Appellee Local breached its fiduciary duty to him in not representing him in good faith before the arbitrator. Our jurisdiction over this claim is clearly not ousted by the Taft-Hartley Act since appellant is suing solely to enforce his rights as a union member and not to enforce rights of employment. See Falsetti v. Local Union No. 2026 United Mine Workers of America, 400 Pa. 145, 161 A. 2d 882, and Wax v. International Mailers Union, 400 Pa. 173, 161 A. 2d 603."

Thus the inference is clear that if plaintiff's claim had been for restoration of his rights of employment, as is the case here, the State courts would have no jurisdiction.

Also in the case of Wax v. International Mailers Union, supra, the Supreme Court said (p. 184):

> "There is no doubt that the prophetic remarks of Justice Harlan who concurred in the result that the Garmon case 'will stand as a landmark in future "pre-emption" cases in the labor field' will be borne out."

Mr. Justice Cohen (author of the opinion in the Wax case) then proceeds to state (p. 168):

"We read the Garmon decision as Justice Harlan reads it. Out of the intricate maze of prior opinions, their distinguishing characteristics and their attending confusion both to the bench and bar, the Supreme Court in one landmark case has created order. We can add nothing to the language used by Justice Frankfurter in so doing. He has directed attention to the significant criteria by which both the state and federal judiciary must determine whether jurisdiction exists in these labor situations. We are to be concerned solely with de-limiting the areas of potential conflict between the two law-enforcing authorities, and in so doing, we should focus on the nature of the activities rather than on the method of regulation. The unifying consideration should always be that Congress has entrusted responsibility in this area to an administrative agency, the N.L.R.B., equipped with specialized procedures and peculiar expertise, to which body primary determinations of jurisdiction should be referred in order to effectuate the intent of Congress, in the Taft-Hartley Act, to fashion a national labor policy. The test given us by the Supreme Court to apply is not at all complex. Is the activity arguably within section 7 or section 8? If it is, then the jurisdiction of state and federal courts is ousted. Only a subsequent determination by the N.L.R.B. that the activity is neither protected nor prohibited can vest jurisdiction once again in our courts."

Can there be any doubt, then, that under the decision in Baker v. Shopman's Local, supra, that the allegations that the conduct of the defendants was "arbitrary

and discriminatory; that the defendant international and local breached their duty to fairly represent all members of the bargaining unit and breached their fiduciary duty owed . . . specifically to the plaintiffs to fairly, honestly and impartially and with proper fidelity negotiate and otherwise act on their behalf," is arguably within section 7 or section 8 of the National Labor Relations Act?

The Supreme Court in the Baker case said (p. 31):

> "This type of activity is at least arguably, if not more, subject to Section 7 or 8 of the Act, in violation thereof and with the protection of Section 10: Holman v. Industrial Stamping and Mfg. Co., 344 Mich. 235, 74 N.W. 2d 322, 29 Labor Cases 69, 651 (1955); McNish v. American Brass Co., 139 Conn. 44, 89 A. 2d 566, cert. den. 344 U. S. 913 (1952); NLRB v. Wheland Co., 271 F. 2d 122 (C.A. 6, 1959); NLRB v. Dallas General Drivers, Local 745, 228 F. 2d 702 (C.A. 5, 1956)."

As in the Baker case we hold that jurisdiction in this matter is in the NLRB and that the State courts must yield thereto.

Having reached the conclusion that this court does not have jurisdiction of this case, the first preliminary objection filed by each of the defendants must be sustained. It is, therefore, unnecessary to consider the remaining preliminary objections. However, since we assume an appeal will be taken, we will make a decision on the other preliminary objections which, if sustained, would necessarily result in the dismissal of the complaint. These involve two contentions. First, the contention of the defendants that the plaintiffs have stated no cause of action and secondly, the contention by the plain-

tiffs in their alternative action that they are entitled to severance pay if not the restoration of their seniority rights.

On behalf of the defendant employer it is contended that even if the court were to take jurisdiction of the matter, it would have no power to grant the relief prayed for since the court cannot reinstate the 1957 contract which admittedly has expired. This, it is contended, is exactly what the plaintiff is asking the court to do.

In answer to this, the plaintiffs state in their brief that they have not asked for a reinstatement of the 1957 agreement but, in effect, ask that the seniority provisions of the 1959 and subsequent agreements be declared null and void by virtue of their having been improperly negotiated.

Assuming just for the sake of argument that the court did conclude that the 1959 agreement was null and void by virtue of its having been improperly negotiated, this would not give the court authority to restore the plaintiffs to their seniority rights since these rights existed only by virtue of the contract which expired on May 31, 1959, and if the 1959 contract and any subsequent contracts are null and void then there is no contract existing between the parties, and the plaintiffs have no rights at all either to seniority, vacation pay, severance pay or anything else in connection with their employment at the Struthers Wells Corporation. In the case of Polanskey v. Monongahela R. R. Co., 342 Pa. 188, the Supreme Court of Pennsylvania said:

> "While a contract between employer and employee with respect to seniority rights may support an action in equity, an employee has no inherent

rights to seniority in service except as provided for in the contracts entered into and the rules adopted by the employer relating thereto."

Also in Fawcett v. Monongahela Railway Co., 391 Pa. 134, the court said:

> "There is no natural or vested right to seniority. Seniority arises only as a result of a contract express, or clearly implied: Madera v. Monongahela Rwy. Co., 356 Pa. 460, 52 A. 2d 329; Polanskey v. Monongahela R. R. Co., 342 Pa. 188, 19 A. 2d 377."

Thus as we have pointed out since the 1957 agreement expired on May 31, 1957, if the court should grant the prayer of plaintiffs' complaint by setting aside the 1959 agreement, this could only result in a further finding that thereafter no contract at all subsisted between the company and the union. This court certainly has no power to rewrite a new contract between the parties or to rule that the provisions of the 1957 contract continued to remain in effect. But even if we did have such power and so ordered such an order would have given plaintiffs no seniority rights at the Iron Works and they would have been subject to layoff at the Forge Works when work declined.

The court does not know why the company saw fit to move machinery and work from the Forge Works to the Iron Works or the Perry Forge Shop. But that in our opinion is none of the court's business. The company has a right to establish its methods of production and if it sees fit in its mangerial prerogative to transfer its operations from one plant to another it certainly has the right to do so as long as we have the free enterprise system in this country.

We think the plaintiffs themselves agree with this proposition, but they contend that in doing so, the employer had no right to discriminate against the employees of the shop from which work is removed, in this case the Forge Shop. Hence they contend that the only fair thing for the company and the union to do under these circumstances would be to integrate or dovetail the seniority of the workers in both shops as though the whole operation had been one shop with one seniority list in the beginnning. Naturally the Iron Works employees would be opposed to such an integration of the seniority lists since an arrangement would be prejudicial to them and had the company entered into such an arrangement solely on the basis of a vote of the forge employees only, it is not difficult to imagine the cries of discrimination that would have arisen from the iron workers.

Hence obviously the company undertook to secure an arrangement which would give the forge employees as much security as possible by placing them all at the foot of the seniority list of the iron workers, which was the only agreement that had any possible chance of adoption by the union.

As pointed out in the company's brief, without such a contract, when a forge employee was laid off at the Forge Shop and hired at the Iron Works, he found himself with less seniority there then relatively new forge employees who had been previously laid off at the Forge Shop and rehired at the Iron Works. This "inversion" of seniority status resulted from the separate list system, because under that system no forge employee had any seniority at all at the Iron Works and could not get any except by first being laid off at the Forge Plant and re-

hired at the Iron Works. The result of this system was that because low seniority people were laid off first, of those forge employees, who over a period of time, were laid off at the Forge Shop and rehired at the Iron Works, the youngest in point of total service with the company nevertheless had the most seniority because they had been hired at the Iron Works before the older ones were laid off at the Forge Shop and rehired at the Iron Works. This situation also resulted in discrimination against forge employees with long service and deprived the company as well of the services of skilled employees by requiring the company to keep in its employ workers with relatively short periods of service.

To correct this obviously unfair situation the company proposed that the forge employees be placed at the bottom of the seniority list of the iron workers which was the only plan that had any chances of being accepted and it was accepted and put into effect by the union and thereafter put into effect by the parties. We are wholly unable to see how the court has any right to say to these parties that they must go back and rewrite this contract by dovetailing the seniority rights of the forge employees with the iron works employees even though this may result in the necessity of laying off seventy or eighty iron works employees whose seniority will be thereby superseded. It, therefore, is our conclusion that the demurrer must be sustained.

On behalf of the union defendants, it is urged that the complaint fails to state a proper cause of action upon two grounds: First, the plaintiffs right to relief in this court is barred by failure to exhaust the remedial procedures accessible to them under Article V of the collective bargaining agreement, and

Second, that seniority provisions may be modified by subsequent agreements entered into between the employer and union and no member of a union may compel the officers to sacrifice their discretion in considering and weighing the merits of a particular grievance or complaint.

Article V of the 1957 Collective Bargaining Agreement between the company and the union entitled "Grievance Procedure," contained five steps to be followed in the processing of grievances with the fifth step providing for the appointment of an arbitrator.

Plaintiffs allege in paragraph thirty-seven of the complaint that in accordance with Step No. 2, a grievance was filed with the personnel director of the defendant company who refused to accept it by reason of instructions from the defendant Wiles, as Chairman of the Grievance Committee of the defendant union.

It is thereafter alleged in subsequent paragraphs of the complaint that by reason of the actions of defendant employer and the arbitrary, unreasonable, discriminatory and improper actions of the defendants Graham and Wiles it was impossible for plaintiffs to further process this grievance in accordance with the provisions of the contract and that further action on their part was useless and futile in view of the attitudes of these above named defendants.

Without laboring this point at length because it is so fully discussed in the case of Falsetti v. Local Union No. 2066 United Mine Workers of America, 400 Pa. 145, it is our opinion that this pleading does not meet the requirements of the "exhaustion rule" as outlined in that case. This is particularly so in view of the subsequent aver-

ments of the bill that upon filing a grievance with the International Union, International Vice President Precht of Denver, Colorado, was assigned to make an investigation and reported following his investigation that the 1959 agreement should be overruled and rescinded and that plaintiffs were entitled to have their seniority rights restored.

With the weight of such a report on their side, why then was not step 3 of the grievance procedure followed where the grievance committee meets with the personnel director, at which meeting the grievance committee may have with them an international representative?

Merely to plead that further action on the part of the aggrieved plaintiffs would be "useless and futile" is not sufficient to bring the plaintiffs within the exceptions to the "exhaustion rule" outlined in Falsetti, as such an allegation is simply a conclusion of the pleader insufficient to support jurisdiction (Falsetti v. Local U., supra, p. 165).

So far as the second point advanced by the union defendants in support of their contention that the plaintiffs have stated no cause of action is concerned, we think that if we had jurisdiction, and if plaintiffs had exhausted their remedies under the provisions of their contract and that the pleadings established that the company and union conspired to deprive plaintiffs of their rights under the dicta set forth in the Falsetti case, p. 171, et seq., plaintiffs would have a cause of action.

But the present case is not merely based on the failure of the union to process plaintiffs' grievances in good faith thereby rendering it liable for breach of duty but on the contrary is based upon the proposition that the

union officers sided with the majority when the union by action of the majority refused to integrate or "dovetail" plaintiffs' seniority rights with the seniority rights of the employees of the Iron Works. For the reasons we have previously stated the proposed consolidation of these seniority lists creates problems no matter what is done. If the union officers had supported plaintiffs' proposal, their fellow iron workers would have literally accused them of selling them down the river whereas when they withheld such support, they are accused of discrimination, arbitrary, unfair and illegal procedure. How then can the union or union officers be held liable to plaintiffs for breach of duty by entering into the 1959 agreement when such action only ratified the action of the union itself taken by the vote of the majority? It seems to us that the mere asking the question provides the answer.

It must be remembered that the provisions of the 1959 agreement took away no rights from the plaintiffs which they enjoyed under the provisions of the 1957 agreement. Under the terms of this latter agreement they had no seniority in the Iron Works, hence the 1959 agreement actually improved their position as we have previously pointed out in the discussion of the employer's contentions. However, if the 1959 agreement consolidated or integrated the seniority lists as advocated by plaintiffs, the iron workers existing rights would have been impaired because under such an arrangement forge workers who previously had no seniority in the Iron Works would suddenly be advanced beyond iron workers who may have had several years seniority. Hence it is not surprising that the iron workers would be opposed to such a proposal. Unfortunately for the forge workers,

the iron workers were in the majority and their wishes prevailed. But this does not give the court authority to set aside the will of the majority and install a different kind of seniority list even if we did think some other arrangment would be more equitable.

Finally we pass to a consideration of plaintiffs' contention that they are entitled, in the alternative, to severance pay as a result of the closing of the Forge Shop.

So far as this case is concerned, the question of the plaintiffs' right to recover in equity is also settled by the Falsetti case. What the Supreme Court of Pennsylvania, speaking through Mr. Justice Cohen, said there (p. 168) applies to the present case.

Justice Cohen said:

> "We have carefully read the entire Agreement and can find *no* provision which authorizes appellant to enforce it. Although the seniority provisions relied upon inure directly for the benefit of the appellant-employee and do not exist simply to protect the interests of the Union, appellant's cause of action is precluded by a contractual grievance and arbitration procedure which, by its very terms, limits access thereto the Union. The parties in drafting this Agreement provided for a simple, expeditious and inexpensive grievance procedure to be administered by persons intimately familiar therewith. The procedure outlined was designed not only to promote settlement, but also to foster more harmonious employer-employee and employer-union relations. The parties expressly sought to avoid litigation, recognizing that the courts are particularly ill-equipped to assume the role of umpire in industrial disputes.

Cf. Slocum v. Delaware, Lackawanna & Western R. Co., 339 U.S. 239, 70 S. Ct. 577, 94 L. Ed. 795 (1950). It should be noted that after the first step in the five outlined in the grievance procedure, the complaint is to be processed by representatives of the Union. The ultimate responsibility in discharge cases is thereby left not to individual members, but rather to their trustee in these matters. The result we reach thus flows as a matter of course from the face of the Agreement. In effect, the appellant is a beneficiary of the appellee Company's promises as to seniority rights, but the Company has limited those promises by refusing to entertain claims based on such rights (beyond the initial complaint stage) unless brought by the other party to the Agreement, the trustee Union. The limited character of the Company's promises serves to defeat any attempt to get redress individually.

"To view this type of agreement otherwise would lead to chaos and a breakdown in the entire scheme of collective bargaining for which the parties have provided and contracted. Instead of being able to rely on the disposition of employee grievances through the established machinery, the Company would face the constant threat of attempted individual enforcement through litigation. Union responsibility would be diminished and all parties would suffer. For these reasons, most, if not all, Union-management agreements of any magnitude in force throughout the Commonwealth are similarly drafted, with an eye toward reposing enforcement responsibility in the labor organization concerned."

ORDER; EXCEPTION

For the foregoing reasons, it is our conclusion that the preliminary objections filed by the defendants challenging the jurisdiction of the court and demurring to the complaint must be sustained. Having reached this conclusion, it is unnecessary for us to consider the remaining objections based upon alleged Misjoinder of Actions, the Motion to Strike and More Specific Complaint.

Entertaining these views, we enter the following

ORDER

And Now, December 26, 1961, the preliminary objections filed by the defendants styled I and II challenging the jurisdiction of the Court and demurring to the complaint are sustained and the complaint is dismissed at the cost of the plaintiffs.

Per Curiam,

HERBERT A. MOOK,
President Judge.

Eo die, an exception is sealed for the plaintiffs.

Per Curiam,

HERBERT A. MOOK,
President Judge.

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FILED
MAR 13 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 751

F. J. COSMARK, JOHN C. MARTIN and MELVIN D. PATTERSON, Individually, and as Representatives of a Class, *Petitioners*,

v.

STRUTHERS WELLS CORPORATION; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS OF AMERICA (AFL-CIO); LOCAL 636 Thereof; RUSSELL A. GRAHAM, Individually; LEE A. REISINGER, DONALD E. CHAPEL and HARRY A. WILES, Individually, and as Representatives of a Class, *Respondents*.

On Petition For a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF IN OPPOSITION OF INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS OF AMERICA, AFL-CIO, ET AL.

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On Petition For a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF IN OPPOSITION OF INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS OF AMERICA, AFL-CIO, ET AL.

To the Honorable Earl Warren, Chief Justice of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW

The opinion of the Supreme Court of the State of Pennsylvania is reported at 412 Pa. 211, 194 A. 2d 325 and is printed in Appendix B, pages 26-35, of the Petition. The opinion of the Court of Common Pleas of Crawford County, No. 3, September Term 1960, not officially reported, is

printed as Appendix 1 to the Brief in Opposition of Struthers Wells Corporation.

JURISDICTION

The jurisdiction requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Does a state court have jurisdiction to entertain a suit by employees against their collective bargaining representative and their employer, based upon their allegation that their bargaining representative breached its duty of fair representation to them by agreeing to execute a provision in a collective bargaining agreement with the employer, which agreement resulted in a change in their seniority status and their layoff by the employer, which conduct arguably constitutes an unfair labor practice under Section 8 of the National Labor Relations Act?

STATUTE INVOLVED

Sections 7, 8(a), 8(b), 9(a), 10(a) and 10(c) of the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. Sections 157, 158(a), 158(b), 159(a), 160(a), and 160(c), (hereinafter referred to as the "Act") are set forth at pages 21 to 25 of Appendix A of the Petition.

STATEMENT OF THE CASE

Respondents, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers of America, AFL-CIO, et al. (hereinafter, the Union), concur in the counter-statement of the case presented at pages 2 to 7 of the Brief in Opposition of Struthers Wells Corporation.

REASON WHY THE WRIT SHOULD BE DENIED

The Decision of the Pennsylvania Supreme Court Is Fully in Accord With the Applicable Decisions of This Court and Presents No Important Question of Federal Law.

The Pennsylvania Supreme Court, relying upon the pre-emption doctrine enunciated in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, and reiterated only last term in *Local 100* v. *Borden*, 373 U.S. 690, held that the matters complained of were exclusively within the jurisdiction of the National Labor Relations Board, and affirmed the order of the Court of Common Pleas dismissing the action for lack of jurisdiction.

The Court held that the complaint was not based on a contractual claim which might bring it within the scope of Section 301 of the Act and the doctrine of this Court set forth in *Smith* v. *Evening News Association*, 371 U.S. 195. Specifically, the Court stated as follows:

> "However, the *only* actions which fall within that class of actions to which state courts' jurisdiction extends under the rationale of Evening News Association are '[s]uits for *violation of contracts* between an employer and a labor organization representing employees in an industry affecting commerce . . ., or between any such labor organizations . . .': (Emphasis supplied) Section 301 of the Labor Management Relations Act, supra, 29 U.S.C. § 185. If the action is not based upon a *violation* of the terms and provisions of a collective bargaining contract or agreement between a labor organization and an employer, then the state court has no jurisdiction. In Schatte v. International Stage Employees and Moving Picture Machine Operators, 84 F. Supp. 669, aff'd 182 F. 2d 158, reh. den. 183 F. 2d 685,

cert. den. 340 U.S. 827, 71 S. Ct. 64, reh. den. 340 U.S. 885, 71 S. Ct. 194, the court stated (84 F. Supp. 672): 'any right of recovery under Section 301 must rest upon a *contract* and its asserted violation. The whole Act relates to labor contracts, hence it must be a contract contemplated by the Act, i.e., a collective bargaining contract or contract relating to fair or unfair labor practices.' The plain and unambiguous language of the statute compels no other conclusion.

"The real crux of the Employees' complaint is stated in paragraph 20 of their complaint: 'The execution of the 1959 Agreement, and the actions and agreement of the [Employer] and the [International and Local] with relation to the seniority rights of the [Employees], the Forge Employees, were invalid, improper, void and illegal, for the reasons and averments hereinafter set forth, and resulted in the loss of all of the seniority rights of the [Employees] which they had accumulated prior to May 1, 1959 . . .' *Neither in paragraph 20 nor in any other portion of the complaint is there an averment of a violation of the 1959 collective bargaining agreement between the Unions and the Employer.* The thrust of the complaint is an attack upon the conduct of both the Unions and the Employer in the negotiations and the incidents which led to and resulted in the formation of the new seniority provisions in the 1959 agreement and a challenge to the bona fides of the Employer and the Union vis-a-vis the Employees. *In effect, the complaint seeks a rescission of the seniority provisions in the 1959 collective bargaining agreement* allegedly brought about by improper conduct on the part of the Unions and the Employer and the reinstatement of the pertinent seniority provisions of the 1957 collective bargaining agreement. *However, no violation of the collective bargaining agreement between the Unions*

and the Employer is averred and, absent such an averment, the instant case is clearly not within the class of actions contemplated by Section 301, supra, and the rationale of Evening News Association, supra.

"An examination and a study of this complaint clearly reveals that the basic general rule which excludes the jurisdiction of state courts applies and that the Employees' *exclusive* forum is the National Labor Relations Board and not the state courts. The Garmon rule commands the exclusion of this action from the jurisdiction of the state courts and the court below properly dismissed the complaint for lack of jurisdiction.

"That which the Supreme Court said in Borden, supra (373 U.S. 698) is presently applicable: 'In the present case the *conduct* on which the suit is centered, whether described in terms of tort or contract, is conduct whose lawfulness could initially be judged only by the federal agency vested with exclusive primary jurisdiction to apply federal standards.'" (Italics with underscoring in original; Italics only added.) (Appendix B to Petition, pages 33-35.)

This case arose as the result of preliminary objections, in the nature of a demurrer, to the complaint. The Supreme Court of Pennsylvania has ruled that "no violation of the collective bargaining agreement between the Union and the Employer is averred." It is clear that this ruling is correct, notwithstanding Petitioners' belated effort to correct their failure in pleading at the trial court level by setting forth their conclusions in the Petition for the Writ. It should be noted further that there is no explicit contradiction in the Petition of the Supreme Court of Pennsylvania's ruling on this point. Indeed, the ruling of the court below appears to be admitted by Petitioners' emphasis that the "gravamen"

of the complaint was the allegation with respect to the alleged breach of the duty of fair representation.

The Pennsylvania Supreme Court quite properly began its discussion of the preemption doctrine with this Court's pronouncement in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245, that "[w]hen an activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board. . . ." In repeating this rule only last year in *Local 100* v. *Borden*, 373 U.S. 690, the Court noted that "the first inquiry, in any case in which a claim of federal preemption is raised, must be whether the conduct called into question may reasonably be asserted to be subject to Labor Board cognizance." 373 U.S. at 694. Further, quoting from *Garmon, supra*, at page 246, the Court stated that "[o]ur concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered."

This, then, is the test to be applied and the test which was applied by the court below. It is readily apparent that the instant case falls within neither of the exceptions to the preemption doctrine as specified in *Garmon*, namely, cases involving "conduct marked by violence and imminent threats to the public order." 359 U.S. at 247, citing *United Auto Workers* v. *Russell*, 356 U.S. 634, and *United Construction Workers* v. *Laburnum Corp.*, 347 U.S. 656; or activity which is of "merely peripheral concern of the Labor Management Relations Act." 359 U.S. 243-244, citing *International Association of Machinists* v. *Gonzales*, 356 U.S. 617.

Thus, the only issue presented is whether the conduct of Respondents here is "arguably" subject to the National Labor Relations Act, as amended. The answer is clearly in the affirmative.

As Petitioners, themselves, candidly call to this Court's attention, the National Labor Relations Board has held, in *Miranda Fuel Company*, 140 NLRB 181, 185 (1962), that employees have the right, under Section 7 of the Act, to be free from any "unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment," and that any such action by a statutory bargaining representative against employees it represents violates Section 8(b)(1)(A) of the Act and, when such action is an attempt to cause an employer to derogate the employment status of employees it represents, a violation of Section 8(b)(2). Similarly, to the extent that such actions are participated in by employers, their conduct violates Sections 8(a)(1) and 8(a)(3) of the Act. The Board stated that the question was whether the action of a union and employer in derogating an employee's employment status could be said to "encourage membership in any labor organization," and answered that question in the affirmative, relying principally upon this Court's decision in *Radio Officers Union* v. *NLRB*, 347 U.S. 17. The Board noted that "[t]he Supreme Court held in effect in the *Radio Officers* case that the requisite showing of encouragement of union membership was met in that case upon affirming the Board's rationale that such encouragement was the 'foreseeable result' of conduct which had union causation." 140 NLRB at 186.[1]

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[1] The United States Court of Appeals for the Second Circuit denied enforcement of the Board's order on December 11, 1963. Judge Medina, found that the Board was wrong with respect to its conclusions as to all sections mentioned above. Chief Judge Lumbard, concurring, agreed with Judge Medina only with respect to the 8(b)(2) and 8(a)(3) charges. He did not find it necessary to reach the question of the correctness of the Board's conclusion on the 8(b)(1)(A) and 8(a)(1) charges. The Chief Judge found that, even if there is a duty under 8(b)(1)(A), the evidence did not support the Board's conclusion there. Judge Friendly, dissenting, voted to uphold the Board's conclusions on all sections involved. Thus, two of the three judges rejected the *(Continued on Page 8)*

In spite of Petitioners' attempt to explain away *Miranda*, it is submitted that that case is dispositive of the issue presented. It represents the declaration of law by the agency charged with interpreting and administrating the Act and clearly encompasses the actions complained of in this case. While Respondents submit that the Board's decision in *Miranda* is correct, the "arguable" test is satisfied by the mere pendency of the question thus divesting the courts of jurisdiction. As one commentator has noted, the treatment by some courts of suits to enforce the duties of fair representation as an exception to the preemption doctrine occurred before, and is likely to be altered by, *Miranda* which "has now brought unfair representation *clearly* within the Board's regulatory power." Sovern, *Race Discrimination and the National Labor Relations Act: The Brave New World of Miranda*, N.Y.U. 16th Ann. Conf. on Labor 3, 18 (n. 47) (1963). (emphasis added)

It is further submitted that this case should not be used as a vehicle for examination of the Board's *Miranda* doctrine. If this Court should later wish to review that decision, the appropriate means of doing so is in a case involving enforcement of a Board decision based upon that doctrine, and one in which an actual case has been taken through the administrative process. It is respectfully submitted that such course would be preferable to receiving a brief *amicus curiae*.[2]

The decision of this Court in *Syres* v. *Oil Workers International Union*, 350 U.S. 892, in which this Court summarily

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Board's 8(b)(2) and 8(a)(3) conclusions, and only one rejected its conclusions concerning Sections 8(b)(1)(A) and 8(a)(1). *National Labor Relations Board* v. *Miranda Fuel Company*, 326 F. 2d 172 (2d Cir. 1963).

[2] This Court has demonstrated that it is well aware of *Miranda*, even though it has refrained from passing on the correctness of the decision. *Local 100* v. *Borden*, 373 U.S. at 696 (n. 7); *Humphrey* v. *Moore*, 32 U.S.L. Week 4055, 4058 (n. 5) (Jan. 6, 1964).

reversed the decision of the Fifth Circuit affirming the District Court's dismissal of the complaint therein for lack of jurisdiction, does not furnish an adequate basis for the granting of the Writ. It may be noted at the outset that, as observed by then-Professor, now Solicitor General, Cox in his article, *The Duty of Fair Representation*, 2 Vill. L. Rev. 151, 174 (1957), ". . . there is no way of knowing whether the [Syres] case is only a precedent for the principle that there is a statutory duty enforceable in a proper proceeding or for the proposition that an action at law may be maintained in the Federal court." The Board has earlier ruled that revocation of certification exists as a remedy for a breach of fair representation, *Hughes Tool Company* v. *NLRB*, 147 F. 2d 69 (5th Cir. 1945); *Larus and Brother Company*, 62 NLRB 1075. See also *Wallace Corporation* v. *NLRB*, 323 U.S. 248. Prior to *Miranda*, however, the Board had not specifically held that a bargaining agent's breach of its duty of fair representation constituted an unfair labor practice under Section 8 of the Act. That doctrine has been enunciated since this Court's decision in the *Syres* case. Read with this Court's holdings in *Garmon* and subsequent cases, it is submitted that the effectiveness of *Syres*—within the context of the National Labor Relations Act [3]—is at least considerably weakened, to the extent that it stood for the latter proposition suggested by Professor Cox.

A recent case taking exactly this position is *Stout* v. *Construction Laborers Council*, 55 LRRM 2464 (N.D. Ill. December 31, 1963), in which District Judge Decker held that a United States District Court did not have jurisdiction of an action brought by Negro members of a union to enjoin

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[3] Under the Railway Labor Act, 48 Stat. 1185, 45 U.S.C. 151, *et seq.*, of course, no administrative remedy exists, and enforcement of the duty of fair representation may be had only in the courts. *Steele* v. *Louisville and Nashville R.R. Co.*, 323 U.S. 192; *Tunstall* v. *Railroad Terminal*, 323 U.S. 210; *Conley* v. *Gibson*, 355 U.S. 41

the union from operating a hiring hall in a manner discriminatory toward the Negro members. The court held that such action would constitute a violation of the National Labor Relations Act and was, therefore, within the exclusive jurisdiction of the Board. The court's discussion of the issue is worthy of note. It stated, at 55 LRRM 2466, as follows:

> "The plaintiffs argue that in several cases decided under the Railway Labor Act, the Supreme Court has held that a labor union is prohibited from racial discrimination among its members, and that Federal Courts have jurisdiction to enjoin such activity. See Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192, 15 LRRM 708 (1944); Tunstall v. Brotherhood of Local Firemen and Enginemen, 323 U.S. 210, 15 LRRM 715 (1944); Conley v. Gibson, 355 U.S. 41, 41 LRRM 2089 (1957).
>
> "Further, in the case of Williams, et al., v. Yellow Cab Co., 200 F. 2d 302, 31 LRRM 2152, the Court of Appeals of the Third Circuit stated that 'It is clear that the duty thus imposed upon a statutory collective bargaining representative by the Railway Labor Act is likewise imposed by the National Labor Relations Act upon representatives exercising similar powers by virtue of that act.' (*Id.* at p. 304.). The Court went on in that case to hold that the Federal Court lacked jurisdiction to enjoin racial discrimination since the union members there had become members voluntarily and not under compulsion or Federal statute. However, in Syres v. Oil Workers International Union, 223 F. 2d 739, 36 LRRM 2290, the Fifth Circuit, which relied upon the Williams case to dismiss a suit for injunction of a union from racially discriminating among its members for a lack of jurisdiction, was reversed in a *per curiam* decision without opinion by the Su-

preme Court of the United States, 350 U.S. 892. On the basis of the Supreme Court's reversal of the Syres case, the plaintiffs really rest their entire case.

"While it is true that the Supreme Court has not since ruled on the question as to whether or not Federal District Courts have jurisdiction to enjoin racial discrimination by unions which are regulated by the N.L.R.B., and while it seems that standing alone that decision would indicate that Federal Courts do have such jurisdiction, it seems to me that since the Gamon case was decided subsequent to the Syres decision, and that since the policy of the Supreme Court is now to vest primary and exclusive jurisdiction in the N.L.R.B. whenever conduct complained of is arguably subject to the National Labor Relations Act, as amended, that the Syres precedent ought to be disregarded and that Count I should be dismissed for lack of jurisdiction over the subject matter.

"Recently the National Labor Relations Board has apparently moved toward a policy of finding that racial discrimination by a union violates Sections 8(b)(1) and 8(b)(2) of the N.L.R.A. (29 U.S.C. 158(b)(1) and (2)). Hughes Tool Co., 52 L.R.R. 247, is a National Labor Relations Board case in which a trial examiner held on February 26, 1963, that racial discrimination by a union violates those sections of the Act. The Board still has not ruled as to whether or not it will adopt the findings of the trial examiner.

"However, in the related matter of determining whether union or employer conduct in representative elections has been fairly conducted, the Board has several times held that appeals to racial bias will void an election. See Pioneer Bus Co., 140 N.L.R.B. #18, 51 LRRM 1546; Sewell Mfg. Co., 140 N.L.R.B. #24, 51

LRRM 1611; Local Union No. 12, United Rubber Workers, Gadsden, Alabama, 52 LRRM 289; Boyce Machinery Corp., 141 N.L.R.B. #76, 52 LRRM 1393.

"I would say that on the basis of the Garmon case and the trial examiner's finding in the Hughes Tool Co. case, the defendants' argument, that primary and exclusive jurisdiction over the allegations of Count I is vested in the N.L.R.B., is correct, and therefore Count I should be dism[illegible] for lack of jurisdiction over the subject matter."

It will be noted that the Court relied, as a current statement of the Board's position, upon the trial examiner's intermediate report in the case of *Hughes Tool Co.*, Case Nos. 23-CB-429 and 23-RC-1758, Intermediate Report No. 93-63, issued February 26, 1963. The conclusion of the District Court is made stronger still by consideration of the Board's decision in *Miranda*, in addition to the trial examiner's intermediate report in *Hughes Tool Co.*[4]

It is clear that, at the present time, the admitted duty of fair representation is enforceable through unfair labor

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[4] The trial examiner's theory in *Hughes Tool Co.* is supported by Professor Cox's article, *The Duty of Fair Representation*, 2 Vill. L. Rev. 151 (1957). Professor Cox noted at the outset that, "Every union representing employees in businesses affecting commerce is, therefore, subject to a duty of fair representation, imposed by the National Labor Relations Act, without regard to whether the complaining employees have had the union imposed upon them by force of the statute or have designated it by voluntary membership." Id. at 155. After concluding that the duty of fair representation applies to all forms of hostile discrimination, Professor Cox expounds the reasoning under which all of a union's obligations in negotiating and administering a collective bargaining agreement as the exclusive bargaining representative of the employees may fall within the union's obligations under Sections 8(b)(3) and 8(d) of the Act. Concentrating on the 8(b)(3) rationale used by the trial examiner, Professor Cox concluded that, "In my opinion, therefore, breach of the duty to bargain fairly should be held an unfair labor practice." Id. at 173.

practice proceedings under the Act, insofar as National Labor Relations Board rulings are concerned. This view, at least with respect to Section 8(b)(1)(A), has not been reversed by any United States Circuit Court of Appeals. The law writers appear to agree with the main proposition although varying as to the *rationale* for such proposition.[5] It is respectfully submitted that the instant decision of the Supreme Court of Pennsylvania does not present the kind of case which would warrant, under the applicable rulings of this Court, the granting of the Petition herein.

It has been demonstrated above that, as found by the Pennsylvania Supreme Court, the action of Petitioners here was not based upon breach of contract. Therefore, there is no jurisdiction under Section 301 of the Act or this Court's decision in *Smith* v. *Evening News Association*, *supra*.

For the same reason, this Court's recent decision in *Humphrey* v. *Moore*, 32 U.S.L. Week 4055 (January 6, 1964), is of no avail to Petitioners. All of the opinions in that case appear to treat the allegations that the Joint Committee exceeded its contractual authority and that the decision of the Committee was obtained by dishonest union conduct, in breach of its duty of fair representation, as the actual basis for the majority's finding of jurisdiction under Section 301. Stated otherwise, the jurisdictional finding was premised on the decision of the Joint Committee which resulted in Moore's discharge. Additionally, this Court agreed with the conclusion of the Kentucky Court of Appeals that the action there was one to enforce a collective bargaining agreement. Here, the situation is very different. The action is founded entirely upon a claim of breach of fair representation. As noted above, unlike *Humphrey*, the thrust of the Complaint was at the execution

[5] See, for example, Professor Cox's reading of Section 8(b)(3) in this regard; footnote 4, *supra*.

of the 1959 agreement, as was found by the Pennsylvania Supreme Court. Also unlike *Humphrey*, the union here refused under the 1957 agreement to agree to the employer's proposal to combine the seniority lists. Finally, under the 1957 agreement, Petitioners admit that grievances filed by certain Iron Works Employees were dismissed by an arbitrator appointed under the provisions of that agreement. No claim is made that that proceeding was not fair in all respects (¶51 of Complaint, App. C of Petition, p. 60).

For the reasons stated above, the complaint here is not, as a matter of substance or form, one for breach of a collective bargaining agreement. If *Humphrey* has any pertinency to the instant case, it provides additional authority for the conclusions of the Court of Common Pleas that, completely apart from the jurisdictional issue, the complaint stated no cause of action. Indeed, the latitude afforded statutory bargaining representatives in dealing with questions of contract administration, such as seniority, was reaffirmed in *Humphrey*, citing *Ford Motor Company* v. *Huffman*, 345 U.S. 330, 338. See also *Holman* v. *Industrial Stamping Company*, 344 Mich. 235, 74 N.W. 2d 322 (1955); *Holman* v. *Industrial Stamping Company*, 142 F. Supp. 214 (E.D. Mich. 1956).[6]

CONCLUSION

In sum, the case presented is solely one for breach of the duty of fair representation and, as such, easily satisfies the "arguable" test set forth in *Garmon*. Nor can Petitioners succeed in their attempt to convert the issue here into one of breach of a collective bargaining agreement.

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[6] Contrary to the assertion of Petitioners (Petition, pp. 12-13), the *Holman* cases also ruled on the jurisdictional issue in a manner consistent with Respondents' position herein and are not subject to the distinctions attempted by Petitioners.

Petitioners do not question the rule in *Smith* v. *Evening News Association*, *supra*. They appear to view this case as involving a breach of contract:

> Inasmuch as the remedy for breach of contract is not within the exclusive jurisdiction of the National Labor Relations Board, *Smith* v. *Evening News Association*, supra; *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corporation*, 348 U.S. 437, 444, 75 S. Ct. 489, 492 (1955), this action against the union based upon its failure to secure the remedy for the plaintiffs must likewise not be within its exclusive jurisdiction." (Page 19 of Petition.)

The Supreme Court of Pennsylvania has ruled that the Complaint did *not* involve a violation of the labor agreement. As indicated above, this ruling and the Court's decision that the conduct of Respondents is arguably subject to the Act and, therefore, within the exclusive jurisdiction of the Board and is both correct and consistent with the applicable decisions of this Court. Certain it is, however, that the question of the Court's ruling on the pleadings does not raise an issue of general importance in the administration of the law which should be reviewed by the Supreme Court of the United States.

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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